

UNIVERSIDADE DE LISBOA
INSTITUTO DE CIÊNCIAS SOCIAIS



If You Cannot Beat Them, Make Them Join You:
The Risks of Capture in Portuguese Regulatory Agencies

Susana Isabel Duarte Coroado

Orientador: Doutor Pedro Miguel Dias Costa Coutinho Magalhães

Co-Orientador: Doutor Luís Manuel Macedo Pinto de Sousa

Tese especialmente elaborada para obtenção do grau de Doutor em Ciência Política
(especialidade de Política Comparada)

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LIST OF ACRONYMS

AACS	<i>Alta Autoridade para a Comunicação Social</i> (High Authority for the Media)
AdC	<i>Autoridade da Concorrência</i> (Competition Authority)
AMT	<i>Autoridade da Mobilidade e Transportes</i> (Mobility and Transports Authority)
ANAC	<i>Autoridade Nacional da Aviação Civil</i> (Civil Aviation National Authority)
CRESAP	<i>Comissão de Recrutamento e Selecção para a Administração Pública</i> (Recruitment and Selection Committee for Public Administration)
ANACOM	<i>Autoridade Nacional para as Comunicações</i> (National Authority for Communications)
ASF	<i>Autoridade dos Seguros e Fundos de Pensão</i> (Insurance and Pension Funds Authority)
BdP	<i>Banco de Portugal</i> (Bank of Portugal)
CDS	<i>Partido do Centro Democrático Social</i> (Party of the Social Democratic Center)
CGD	<i>Caixa Geral de Depósito</i>
CEDIPRE	<i>Centro de Estudos de Direito Público e Regulação da Faculdade de Direito da Universidade de Coimbra</i> (Center for Studies in Public Law and Regulation of the Faculty of Law of the University of Coimbra)
CMVM	<i>Comissão do Mercado de Valores Mobiliários</i> (Securities Market Commission)
CV	<i>Curriculum Vitae</i>
DG	Directorate-General

EDP	<i>Electricidade de Portugal</i> Electricity of Portugal
ERC	<i>Entidade Reguladora da Comunicação Social</i> (Media Regulatory Entity)
ERS	<i>Entidade Reguladora da Saúde</i> (Health Regulatory Entity)
ERSAR	<i>Entidade Reguladora da Água e Resíduos</i> (Water and Sewage Regulatory Entity)
ERSE	<i>Entidade Reguladora dos Serviços Energéticos</i> (Energy Services Regulatory Entity)
EU	European Union
FLIRA	Framework Law of the Independent Regulatory Agencies <i>(Lei-Quadro das Entidades Reguladoras)</i>
GDP	<i>Gross Domestic Product</i>
ICP	<i>Instituto de Comunicações de Portugal</i> (Portuguese Communication Institute)
IMF	International Monetary Fund
INAC	<i>Instituto Nacional de Aviação Civil</i> (Civil Aviation National Institute)
IRA	<i>Independent Regulatory Agency</i>
ISP	<i>Instituto de Seguros de Portugal</i> (Portuguese Insurance Institute)
MoU	Memorandum of Understanding
OECD	<i>Organization for Economic Cooperation and Development</i>
PCP	<i>Partido Comunista Português</i> (Portuguese Communist Party)
PPP	Public-Private Partnership
PRACE	<i>Programa de Reforma da Administração Central do Estado</i> (State Central Administration Reform Program)
PS	<i>Partido Socialista</i> (Socialist Party)
PSD	<i>Partido Social Democrata</i> (Social Democratic Party)

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ABSTRACT

The rise of the regulatory state (Levi-Faur 2005) led to the global diffusion of independent regulatory agencies – IRAs – (Jordana et al. 2018) which are expected to operate at arm's length from politicians and the regulated businesses (Majone 1997; Thatcher 2002). Diffused across different geographies, sectors, varieties of capitalism, and administrative and political traditions, IRAs became an institutional norm of regulation. However, several crises have questioned their performance and raised concerns over industry capture and politicization (Lodge and Mennicken 2014). This thesis tackles these issues through five questions: i) To what extent are IRAs shielded from capture at the *de jure* and *de facto* levels? ii) Have IRAs experienced any changes in independence over the years? iii) In which direction has institutional change moved? iv) Which inputs have contributed to that change? v) Are there sectors that are more likely to be captured than others?

The thesis adopts a cross-sectorial and diachronic with-in case study approach, in seeking to understand how eleven Portuguese IRAs in key economic sectors evolved overtime on what concerns their legal and *de facto* independence vis-à-vis the external stakeholders. Empirically, the study finds that the agencies are subject to a variety of political and industry influences that are exerted through different forms. At the formal level, the regulatory state as a whole and the IRAs, in particular, have shown inconsistencies and shortcomings that can render them fragile. Moreover, the successive legal reforms suggest that agencies continue to show credibility problems, but also that politicians keep safeguarding control mechanisms. At the *de facto* level, the politicization and industry capture are observable and measurable through the intensity of the revolving door, particularly in the financial and the utilities agencies.

Keywords: Independent Regulatory Agencies, Regulatory Capture, Regulation, Independence, Politicization

SUMÁRIO EXECUTIVO

Esta tese examina os riscos de captura a que as agências reguladoras independentes (ERIs) portuguesas estão sujeitas tanto pela indústria e/ou empresas que regulam, como pelos governos e partidos políticos. A investigação estrutura-se à volta do conceito de captura regulatória, ou seja, a influência indevida que as empresa reguladas ou os actores políticos sobre os reguladores, para benefício dos próprios e em prejuízo da imparcialidade e do interesse público. Originalmente proposta pela Escola de Chicago (Stigler, 1971), a Teoria da Captura Regulatória foi mais recentemente desenvolvida por Wren-lewis (2010) e, particularmente no rescaldo da crise financeira de 2007-2008, por Carpenter e Moss (2014) e Kwak (2014). Metodologicamente, a tese adopta uma abordagem intersectorial e longitudinal, através de um estudo de caso, procurando compreender como onze reguladoras portuguesas em sectores económicos chave evoluíram no que diz respeito à sua independência legal e de facto vis-à-vis o risco de influência indevida por *stakeholders* externos.

Enquanto expressão institucional do Estado Regulador, é esperado que as entidades reguladoras independentes operem fora da esfera de influência do poder político e das empresas do sector que regulam (Majone 1997; Thatcher and Sweet 2004). Este modelo institucional difundiu-se globalmente (Jordana et al. 2011), tendo a sua criação atingido um pico no final dos anos 90 (Gilardi 2005b). Ainda assim, apesar deste sucesso institucional, registam-se variações ao nível da independência destas entidades, consoante o sector, a tradição administrativa e a variedade de capitalismo em que se inserem (Bianculli et al. 2013; Gilardi 2005a; Guidi 2014). Aquando da sua inserção nos sistemas político-administrativos, as entidades reguladoras suscitaram dúvidas relativamente à sua legitimidade democrática, uma vez que ao estarem fora do controlo político, a sua prestação de contas assumia um carácter diferente. O problema da *accountability* democrática destes organismos era especialmente preocupante, uma vez que as ERIs, ao tomarem decisões sobre o funcionamento de mercados de interesse público, poderiam

beneficiar determinados grupos em detrimentos de outros e ter um impacto significativo na sociedade em geral (Yeung 2010). Foi, contudo, argumentado que a sua especialização técnica e a sua performance na regulação dos mercados dar-lhes-ia a dita legitimidade (Majone 1999; Thatcher and Sweet 2004).

Na última década, porém, várias crises (financeiras, ambientais) e avaliações sobre a eficiência dos mercados regulados suscitaram dúvidas sobre eventuais falhas regulatórias e reacenderam o debate sobre as entidades reguladoras independentes. Alguns autores associaram as várias crises e falhas regulatórias à captura dos reguladores pelas empresas reguladas ou pelo poder político, que terão instrumentalizado e influenciado aqueles para obterem benefícios. As teorias de captura regulatória estão presentes na literatura académica há várias décadas (conf. Bernstein 1955, Pelzman 1976; Stigler, 1971; Laffont e Tirole, 1991; Carpenter e Moss, 2014), mesmo antes da difusão global das agências reguladoras independentes. A teoria da captura, na sua formulação mais aplicada, defende que toda a regulação é fruto da influência dos grupos de interesse (Stigler, 1971). A literatura evoluiu de forma a abarcar as nuances, os graus e os diferentes mecanismos que caracterizam a captura (Carpenter e Moss 2014). Outros autores passaram a encarar a captura regulatória como um fenómeno que poderia ser levado a cabo não apenas pelas empresas reguladas, mas igualmente pelos poderes públicos que, em teoria, deixaram de ter controlo sobre as ditas ERIs (Wren-Lewis 2010).

Portugal não ficou imune às sucessivas crises e eventuais falhas regulatórias. Apesar de, por vezes, ser considerado um "bom aluno" e "campeão" de reformas lideradas pela UE, sobretudo no que concerne a privatização e a liberalização dos mercados, o país tem atravessado vários problemas económicos e apresentado alguma dificuldade em acompanhar os seus parceiros europeus desde o início dos anos 2000. O país foi severamente atingido pela crise da Zona Euro, levando a uma crise política, social e económica sem precedentes e à negociação de um resgate internacional. Tendo adoptado cedo e com entusiasmo o modelo das ERIs, que não se coadunava com as suas tradições administrativas, jurídicas e políticas, Portugal surge como um estudo de caso interessante para avaliar os riscos de captura de suas agências reguladoras. Assim sendo, enquanto metodologia, optámos por um estudo de caso aprofundado e cronológico, em que analisamos onze ERI portuguesas ao longo do tempo e sob duas dimensões: formal e prática.

Ora, assentando nas premissas de que (i) a captura pode variar consoante as condições, (ii) que a mesma lógica de influência indevida se pode aplicar à relação das ERIs com o poder político, (iii) as falhas regulatórias se têm sucedido (conf. Calvete 2012, Saraiva 2015 ou Almeida 2019), questionámo-nos sobre os riscos de captura das entidades reguladoras em Portugal. Orientados por essa pergunta de investigação principal, dividimos o nosso trabalho empírico em duas partes – uma análise dos aspectos formais relativos à independência das ERI portuguesas e uma segunda análise, focada na independência de facto dessas agências. No que se refere aos aspectos formais das entidades reguladoras, numa primeira fase fazemos uma análise da evolução do Estado Regulador, que abrange as alterações económicas, bem como a criação das onze ERI e a sua evolução. Para medir a independência formal das ERIs portuguesas, aplicamos uma versão reformulada de um índice amplamente testado - o índice de independência formal de Gilardi – aos 33 estatutos das onze agências, o que permitirá observar variações não apenas entre sectores, mas também ao longo do tempo. Com vista a uma análise mais detalhada, são explorados indicadores que medem diretamente o relacionamento com os actores políticos e as empresas reguladas. Procedeu-se à recolha e tratamento de dados nunca antes analisados de forma sistemática: os projectos de lei apresentados no parlamento sobre a independência das reguladoras. A comparação entre os projectos de lei e o diploma final permite uma melhor compreensão dos processos de delegação e os seus limites.

A segunda parte da análise empírica mede o potencial de influência política e dos regulados na prática. Numa primeira fase, retornamos aos debates teóricos, discutindo os mecanismos através dos quais as ERIs podem ser capturadas na prática. São descritas hipóteses que procuram explicar a variação da influência política. Seguidamente e através de uma estrutura semelhante, exploramos as questões que envolvem a influência indevida da indústria regulamentada. No capítulo seguinte, medimos a dita influência de políticos e regulados. O capítulo estrutura-se em três partes, correspondendo aos diferentes momentos em que a influência de políticos e regulados sobre as ERIs pode ser exercida. A primeira parte recolhe, codifica e analisa o perfil profissional e político dos membros dos conselhos de administração das ERIs, identificando se cada indivíduo tem experiência anterior em cargos políticos, cargos da nomeação política ou no sector regulado. A segunda parte traça as opções de carreira dos membros do conselho depois de deixar a

ERI. Realiza análises descritivas e multivariadas através de uma base de dados original de nomeações para membros dos conselhos de administração. O capítulo IX continua a questionar a politização e a captura da indústria na prática, mas de uma perspectiva exploratória. Analisa dados sobre demissões, congelamentos de orçamento e recursos de decisões regulatórias e sancionatórias das ERIs e explorando possíveis inferências e ligações hipóteses anteriormente exploradas.

No capítulo final, apresentamos e discutimos de forma sucinta e sistematizada os resultados obtidos, em termos da independência *de jure* e *de facto* das ERIs e os riscos de captura que estas enfrentam. Esclarecemos de que o desenho institucional das ERIs tem se revelado um caminho difícil, com várias vagas reformistas que, ainda assim, não conseguiram eliminar incongruências e diferenças entre agências. Na verdade, a independência formal tem revelado ser o ponto de tensão entre uma visão tecnocrática da regulação e a política partidária. A evolução positiva do grau de independência formal deve-se a pressões externas, como o direito comunitário, o resgate financeiro ou a necessidade de demonstrar credibilidade a investidores externos. Contudo, os governos fazem o possível para, dentro destas necessidades, manterem alguns controlos legais sobre as ERIs. Verificamos ainda uma tensão entre os partidos na oposição, que pressionam para mais independência formal, e os governos que, por seu turno, resistem a abdicar dos já referidos controlos.

No que se refere à independência *de facto*, verificamos que o sector e a idade das agências têm um impacto importante. As agências do sector financeiro demonstram uma maior propensão para ter nos seus conselhos de administração mais vogais vindos do sector regulado, ao passo que nas *utilities* existem uma maior tendência para que sejam nomeados indivíduos com experiência política. Apesar destas diferenças sectoriais, ao longo do tempo, os governos têm tido menos tendência para nomear apoiantes políticos. Contudo, o efeito da idade da ERI não parece ter influência nas tendências de nomeação de indivíduos vindo do sector regulado ou da administração pública.

Estes resultados empíricos permitem-nos chegar a diversas conclusões. Primeiro, Apesar dos argumentos teóricos que explicam a motivação dos governos para criar ERIs, o poder político parece fazê-lo apenas quando é forçados pelas circunstâncias, como a adoção da legislação da EU, o resgate financeiro ou a necessidade atrair investimentos estrangeiros.

Quando confrontados com essas pressões externas, os governos cedem, mas apenas em certa medida, uma vez que mantêm os poderes mais importantes sobre as agências - nomeação do conselho de administração e controlo orçamental. Na realidade, as ERIs ainda são encaradas como uma extensão da administração pública sob controlo do governo. Tal é particularmente visível no caso de monopólios estatais, antigos ou actuais, como os serviços energéticos ou os transportes, através do número de nomeações partidárias para os seus conselhos de administração. Além disso, uma reguladora parece também funcionar como trampolim para outras carreiras. Enquanto a maioria dos membros dos conselhos de administração regressam às suas carreiras anteriores após a conclusão dos seus mandatos, os dados mostram que aqueles que têm experiência política anterior são os únicos que divergem por outros caminhos profissionais, inclusivamente na indústria que regularam.

A influência das empresas reguladas nas ERIs portuguesas é menos visível que influência política. Na maioria das agências, não se verifica uma forte tendência para nomear indivíduos relacionados ao setor. Os antigos membros dos conselhos de administração também não costumam ser recrutados pelo sector regulados. Tal não significa que a influência não ocorra, mas apenas que não é tão directa. Por outras palavras, os reguladores não são um alvo preferido de influência dos interesses económicos.

O setor financeiro surge como excepção a essa fraca influência dos regulados. Tanto na análise da independência *de jure* como na *de facto*, a influência dos grupos financeiros é bastante visível. Se, à data da sua criação, as três reguladoras financeiras se destacavam em termos de independência formal, com o evoluir dos estatutos das outras ERI, aquelas foram ficando aquém, em termos comparativos. Esta estagnação deve-se, sobretudo, às disposições destinadas a controlar a influência do sector, que se mantiveram relativamente fracas. Na prática, a relação entre reguladores e regulados é particularmente estreita no setor financeiro. Mais da metade dos membros do conselho provém do setor e uma parcela ainda maior é transferida para empresas regulamentadas quando o mandato regulatório termina. Contudo, os laços com o poder político revelam-se igualmente fortes. O número de membros do conselho com experiência política nas reguladoras financeiras não é muito menor do que nas agências *utilities*. Em vez de uma porta giratória, parece existir uma plataforma giratória, na qual indivíduos saltam de cargos políticos para reguladores e para grandes grupos financeiros, na conhecida “dança das cadeiras”.

Estas breves considerações finais são seguidas de uma reflexão sobre as implicações dos resultados, tanto para as diferentes correntes teóricas como para a definição de políticas públicas no domínio da boa governança. Ao revisitarmos a independência formal das ERIs, concluímos que a história do seu desenho institucional não ficou concluída à data da sua criação. Continua, ao longo do tempo, a representar um instrumento de influência à disposição do poder político, mas também sujeito a pressão contínua de factores externos. No que diz respeito à independência *de facto*, esta tese introduziu uma nova perspectiva no enquadramento analítico, pois combina a análise das carreiras *ex ante* e *ex post* dos membros dos conselhos de administração das ERIs, dados ainda poucos explorados em conjunto pela literatura.

A nossa investigação faz ainda uma contribuição original ao estudo e compreensão da captura como um fenómeno. Argumentamos que, ao contrário do que Stigler defendeu na década de 1970, mas de acordo com a literatura mais recente, “a captura regulatória não é um caso de tudo ou nada” (Carpenter e Moss, 2014: 452), é um continuum (Rex, 2018: 3) e, apesar de existir, sua ocorrência não é sistemática (Carpenter 2013). Depende principalmente de setores, idade, governos, mas também de fatores externos que motivam, mas principalmente coagem os governos.

Finalmente, esta tese procurou dar uma contribuição para a forma como a teoria da captura regulatória é tratada na literatura europeia. Durante a crise financeira, a literatura norte-americana foi mais rápida em recuperar a teoria e aplicá-la ao seu contexto, em parte porque há mais dados disponíveis sobre a influência indevida do que a europeia, onde alguns alegaram que os “*burocratas das reguladoras financeiras e dos bancos centrais têm maior probabilidade de construir a sua carreira no setor público*” (Monnet, Pagliari e Vallée 2014: 5). Mostramos, com evidências empíricas, que essa percepção não corresponde totalmente à realidade, tanto no setor financeiro, mas também em outros setores regulados. Assim, as instituições públicas na Europa e a academia devem investigar mais de perto os riscos de captura regulatória no seu contexto.

Palavras-Chave: Entidades Reguladoras Independentes, Captura Regulatória, Regulação, Independência, Portas Giratórias

INTRODUCTION

“The pivotal role of the independent agency has however come under challenge – particularly in the case of economic regulation.”

(Vibert 2016: 1)

The present dissertation examines the risks of capture to which Portuguese independent regulatory agencies (IRAs) are subject to by both the industry and the political principals. It is structured on the concept of regulatory capture, which has been originally proposed by the Chicago School (Stigler 1971), but has been further developed by Wren-lewis (2011;), and, particularly in the aftermath of the 2007-2009 financial crisis, by Carpenter and Moss (2014) and Kwak (2014). Methodologically, it adopts a cross-sectorial and diachronic with-in case study approach, in seeking to understand how eleven Portuguese IRAs in key economic sectors evolved over time on what concerns their legal and de facto independence vis-à-vis the external stakeholders' attempts to influence them.

The Evolution of Independent Regulatory Agencies

The world has changed at a fast pace in the past three to four decades. Societies became more pluralistic and complex. The economy and finance became globalized. Technology took a major leap, dramatically changing how companies and markets operate and how consumers behave. Multi-level governance became the norm in many economic and political domains, in particular in the European Union, where governments at different territorial layers interact with each other and with other extra-institutional actors in a stable and routinized manner to further pursue their common objectives. Services that were traditionally state monopolies were privatized or liberalized, namely telecommunications, electricity or water provision. Instead of reducing its size, as some

prescribed, the state multiplied its functions and modified its presence in markets. The state changed its nature from a positivist state focusing primarily on ownership and production of goods and services, intervening in the economy through taxes and spending to a regulatory state whose role is primarily that of setting norms and ensuring compliance of those norms, directly or indirectly, via regulatory agencies (see Majone 1994, 1997). It can no longer be described as a centralized authority, but a decentralized network of public bodies. These changes had an impact on three different spheres: the public administration, political parties, and the market.

These changes led to another phenomenon - the emergence and diffusion of independent regulatory agencies, with their regulatory powers granted by public law, but not managed by elected officials. Despite being also a product of more encompassing reforms in public administrations that promoted the proliferation of autonomous bodies, regulatory agencies are not just another administrative entity. These (no longer) new administrative bodies have two features that make them relevant to political science and economy studies, but also society at large: they are expected to operate at an arms-length of their political principals and have the responsibility of regulating economic, financial and social domains. Regulation aims at ensuring market efficiency, avoiding failures but also guaranteeing access to public interest services. It encompasses the creation of rules, compliance with those rules and the sanctioning of transgressors by regulatory agencies. These actions end up having differentiated impacts on individuals and interest groups, whether these are companies, consumers or even political actors. In other words, IRAs' decisions and actions create winners and losers of regulation. Having such power and independence (without being subjected to political accountability mechanisms), IRAs end up being the target of several influences and pressures.

Companies individually or the industry as a whole may pressure IRAs to obtain several benefits, namely the maintenance of rents and the status of incumbent companies, the creation of entry barriers to new players, the reduction of regulatory burden or increased market efficiency. Some benefits may have positive outcomes for citizens; others may not. Governments and political parties also have reasons to influence regulators. They may want regulatory decisions to be more in line with their own political goals to please the electorate and obtain more votes. Sometimes, the interests of companies and governments coincide, at other times they collide. In a typically clientelist balance,

politicians may also want regulation to be friendly to companies that grant them political support or funding. In other situations, however, politicians want to push for election-friendly measures, such as price decreases for consumers, against the interests of companies and the overall market efficiency. Being at the center of these two forces, IRAs were expected to defend the public interest, by being more technical than political, but simultaneously being a public authority that oversees the behavior of market stakeholders.

In the past few years, the world has shown signs of change again. Globalization, as we know it, might be over. Technocracy and the role of experts in politics have been questioned. New public management theories did not fully succeed in the "real world" test and have lost some credibility (Vibert 2016). The 2007-2009 financial crisis sparked shock waves everywhere, but it was one of many crises and failures regulatory bodies failed to predict and, in some cases, to manage (Lodge 2016). The list of crises or economic shortcomings that have been linked to regulatory failure is long: food crisis, such as the mad cow disease or the horsemeat scandal,¹ inefficient markets, poor competition, problems with universal access to public services², maintenance of rents³ and environmental disasters, such as Fukushima nuclear disaster⁴ have been frequent, since the 2000s and prompted the debate over the performance of public regulation, the legitimacy of independent agencies and the risks of capture they are exposed to. The source of the democratic legitimacy of IRAs was their performance and technical expertise, which would be judged through public accountability (Majone 1999; Stone and Sweet and Thatcher 2002). Despite being globalized and numerous (Jordana et al. 2011; Jordana et al. 2018), the pivotal role of the independent agency has however come under challenge – particularly in the case of economic regulation” (Vibert 2016: 1).

¹ Lawrence, F. (2013), Horsemeat scandal: the essential guide, The Guardian, 15th February 2013. Retrieved from <https://www.theguardian.com/uk/2013/feb/15/horsemeat-scandal-the-essential-guide> (accessed on 8th August 2019).

² DN/Lusa (2018), Altice ainda não restabeleceu todas as ligações nas zonas atingidas, DN, 28th May 2019. Retrieved from <https://www.dn.pt/portugal/interior/incendios-altice-ainda-nao-restabeleceu-todas-as-ligacoes-nas-zonas-atingidas---ANACOM-9388249.html> (assessed on 10th August 2019).

³ Pinto, S.P. (2019), Rendas de energia. EDP foi beneficiada pelos governos PS e PSD, Sol, 19th April 2019. Retrieved from <https://sol.sapo.pt/artigo/652791/rendas-de-energia-edp-foi-beneficiada-pelos-governos-ps-e-psd-> (accessed on 8th August 2019).

⁴ McCurry, J. (2017), Japanese government held liable for first time for negligence in Fukushima, The Guardian, 17th March 2017. Retrieved from <https://www.theguardian.com/world/2017/mar/17/japanese-government-liable-negligence-fukushima-daiichi-nuclear-disaster> (accessed on 8th August 2019).

Measuring the Risks of Regulatory Capture in Portugal

As IRAs gained importance in the regulatory cycle, they are more likely to be targeted by interest groups. Regulatory capture has been advanced as one of the main explanations for these failures (Garoupa 2016; Kaufmann 2009; Surowiecki 2010). Many, including international financial institutions such as the International Monetary Fund or the European Central Bank, suggested that capture could have led to the inaction of regulators in drafting stricter rules and enforcing them properly over banks and stakeholders. Regulatory capture theories have been around for several decades (conf. Huntington 1952; Bernstein 1955, Pelzman 1976; Stigler, 1971; Laffont and Tirole, 1991; Carpenter and Moss, 2014), even before the global diffusion of independent agencies. Having started as an economic theory (Stigler 1971) that posited that all regulation was a product of capture or that, over the course of time, institutions ended up being captured by the industries they regulate, literature has evolved to grasp the nuances, the degrees and the different mechanisms that characterize capture (Carpenter and Moss 2014). It is also no longer restricted to economic players, but it now looks at other groups that benefit from regulation, such as politicians. Critics of this diagnosis claimed that not all regulatory outcomes are unanimously considered failures by all stakeholders and not all failures can amount to capture. Failure could be caused by other factors, such as lack of information or the simple fact that, as humans, regulators make mistakes (Coglianese 2016). Others have made direct critics against the theory of regulation itself, arguing that it is a very narrow view of regulation and an incomplete account of interest groups participation (Croley 2011). Public interest theorists are the main opponents, as they assume that regulators are benevolent and not self-interested individuals that do not mind being captured (for a more developed explanation please refer to (Lodge and Wegrich 2012). When it is not clear-cut corruption, capture is very difficult to detect and prove. However, the literature has developed enough guidance and mechanisms to assist in the identification of risks and probabilities of capture in given contexts and institutional practices.

On the other hand, the fact that IRAs have been widely adopted by governments does not necessarily mean that politicians are truly convinced of the merits of independent agencies and that they are not tempted to influence them for their benefit. As principals,

governments may try to avoid or minimize "agency losses" caused by delegation (Stone and Sweet and Thatcher 2002). They can do so by manipulating both *de jure* and *de facto* independence of agencies. Empirical research has shown that there is a significant variation on the institutional design of agencies, namely on their degree of independence (Bianculli, Fernández-i-marín, and Jordana 2013; Gilardi 2002, 2005b; Guidi 2014; Hanretty and Koop 2012). Other studies suggest that, after formally delegating power, governments also influence IRA through various channels and, once again, in different degrees (Hanretty and Koop 2013; Maggetti 2007; Thatcher 2002). Even though the rise of the Regulatory State has been regarded as one of the main challenges to effective party government (Mair 2008), the politicization of IRAs is known to take place (Ennsner-Jedenastik 2014a, 2014b, 2016b; Fernández-i-Marín et al. 2016).

Portugal is not an exception. The country was severely hit by the Euro Zone crisis, leading to an unprecedented political and socio-economic crisis and the negotiation of an international bailout. The financial assistance program the country was subject to uncovered inefficiency and extraction of rents in other sectors, namely electricity and railways, as well as performance issues in many of its regulatory agencies (European Commission 2011). Claims of lack of independence and even of the capture of regulators abound among stakeholders, academics and other experts (Calvete 2012; Garoupa and Rossi 2005; Ricardo 2018). Despite being considered a “good student” and “champion” of EU-led reforms such as privatization and liberalization, Portugal has experienced economic stalemate and difficulties in keeping up with its European peers since the early 2000s. Having been an early and enthusiastic adopter of the IRA model, which was foreign to its administrative, legal and political traditions, Portugal emerges as an interesting case study to evaluate the risks of capture of its regulatory agencies.

Twenty years have passed since the peak of the creation of IRAs and claims of regulatory failures abound, but little has been studied about the agencies’ reform or evolution, particularly in the European context. Questions about the evolution of the regulatory state remain unanswered: i) To what extent are IRAs shielded from capture at the *de jure* and *de facto* levels? ii) Have IRAs experienced any changes in independence over the years? iii) In which direction has institutional change moved? iv) Which inputs have contributed to that change? v) What sectors are more likely to be captured? This research aims at answering the question “To what extent are Portuguese independent regulatory agencies

exposed to the risk of capture?” and, subsequently, answer the more general questions on the evolution of the regulatory state listed above.

Contribution of the Thesis

This thesis aims to contribute to the existing literature, by seeking to provide both an analytical and an empirical contribution to the study of regulatory capture and political independence of agencies. Analytically, the study introduces a broad conceptualization and operationalization of regulatory capture. It builds on the work of Wren-Lewis (2010) and posits that agencies can be captured by both the regulated interests and by governments/lawmakers.

This analytical approach has empirical implications. For instance, when measuring the degree of politicization of agencies, many studies have only focused on whether board members had prior political experience (Enns-Jedenastik 2016b; Fernández-i-Marín et al. 2016), but have not account for the number of individuals that move on to politically appointed jobs, in a sort of political revolving door, like it is done in studies that focus on the industry capture (Lucca, Seru, and Trebbi 2014; Makkai and Braithwaite 1992, for instance). Therefore, our work fills in a gap in the literature, as it analyses simultaneously the relationship that EAs have not only with politicians, but also with interest groups. More, it does so with an original dataset that comprises information not only about the background of board members, but also their career once they leave office. This allows following the revolving door circuit, if it occurs, but also compare *ex-ante* and *ex-post* jobs. In addition, by working with this encompassing concept of capture and exploring the politicization of agencies, this thesis contributes to the dialogue between two bodies of literature – regulation studies and party politics.

This research also seeks to contribute to the literature on the formal independence of IRAs from a methodological perspective. Not only it introduces new indicators to the widely used Gilardi de jure independence index (Gilardi 2002, 2005a), updating it, as it conducts a diachronic measurement, which results in new understandings regarding delegation. Moreover, it introduces new types of data – bills presented by political parties and official opinions of IRAs about their status - in the analyses of formal independence, thus

contributing to a better understanding of the political processes behind the institutional design of IRAs.

Finally, by examining an understudied case such as Portugal, the thesis aims to fill a lacuna in the literature. On the one hand, going beyond the paradigmatic cases and furthering the knowledge about Mixed Market Economies and regulatory policies in Southern Europe. The literature on the independence of IRAs has been largely dominated by the largest and more paradigmatic case studies, such as the United Kingdom, France, Italy and Germany (Thatcher 2002, 2005, 2011). Other cases have been studied, such as Spain (Fernández-i-Marín et al. 2016), the United States (Katic 2015) or Switzerland (Maggetti 2014), but in most cases only focus on a particular aspect of the regulatory cycle.

Moreover, being a bailout country, it also hopes to contribute to the more recent literature on the financial crisis and the austerity period. On the other hand, it seeks to contribute to the Portuguese literature on its regulatory agencies. Legal studies on the Regulatory State (...) and independent regulatory agencies abound, namely about their independence (see, for instance, Miguel and Beato 2014; Ricardo 2018; Vieira da Silva 2017). Economists have added some inputs, Confraria being the most notorious author (Confraria 2005b). Contributions from other disciplines are scarce or limited to particular aspects of the regulatory governance (some notorious examples are Marques and Pinto 2018; Nunes and Rego 2015; Santos and Bilhim 2014).

Outline of the Thesis

The thesis is divided into two parts – one theoretical and one empirical – organized in nine chapters. The first two chapters outline the theoretical foundations of the thesis. Chapter I offers an overview of the literature on independent regulatory agencies from the perspective of regulation and public administration studies. It explains the transition of a Positive to a Regulatory State, the reasoning behind regulation and the emergence of independent regulatory agencies. It also offers an overview of the theoretical debate around the creation of such bodies and the questions raised about their democratic legitimacy. It concludes by explaining how that debate that was settled re-emerged a couple of decades later, after a series of public crises and alleged regulatory failures.

Chapter II places the debate over the performance of independent regulatory agencies in the framework of the capture theory. The theory argues that regulatory institutions and rules end up being unduly influenced by some of the regulated firms (usually the incumbents) or the industry as a whole. We claim, however, that the politicization of agencies is a form of regulatory capture. Therefore, party politics studies and their impact in public administration are also explored under the capture framework. It also discusses how regulatory capture can be measured by examining the degrees of independence and accountability of agencies. By doing so, this part introduces the empirical part of the thesis.

The methodological sections correspond to chapters III and IV. In chapter III, it is explained why Portugal was chosen as a relevant case study for this thesis. Having mixed market economy, a Napoleonic public administration, as well as a corporatist political system and a formal legalist tradition, the country was not expected to be a prolific privatizer and early adopter of the IRAs model. Nevertheless, it was considered for years the good student of the European Union until its economic and institutional performance began to show signs of problems, which culminated with an international financial bailout in 2011.

Chapter IV presents the research design and methodology. It specifies the research questions and justifies the choice for a within case study method, which combines qualitative, quantitative and exploratory techniques. It also sets out how the empirical chapters are divided, and the research questions addressed. Finally, it explains the type of data used, how it was collected, organized and analyzed.

The empirical part of the thesis is divided into two major sections. The first analyses the institutional design of the agencies and is composed of two chapters. The second section is dedicated to the de facto independence of agencies concerning regulatees and principals. Chapter V focuses specifically on the emergence of the Portuguese Regulatory State, the creation of the independent regulatory agencies and the legal and political debates it sparked. It goes on to explain the different phases the Portuguese Regulatory State went through and the evaluations it was subject to. Finally, it offers an overview of the different sectors and their respective regulators.

Chapter VI discusses the formal independence of regulators. It presents the various hypotheses that have been advanced by empirical studies on regulation to explain the creation and diffusion of IRAs but also introduces other hypotheses based on the party politics literature. To measure the formal independence of the Portuguese IRAs, it applies a reformulated version of a widely tested index – Gilardi’s formal independence index – to all the 33 statutes of the eleven agencies, which will enable tracing variation not only across sectors but also over time. In order to refine the analysis, indicators that measure directly the relationship with politicians and regulatees are explored in detail. The chapter introduces data that has never been analyzed in previous studies: the bill presented in parliament that has not been approved. Such data allows a comparison with the laws and statutes approved and facilitates the testing of the hypothesis concerning the influence and posture of political parties in relation to the power delegation to IRAs.

The second section looks at the practice of agencies. Chapter VII returns to theoretical debates, as they discuss the mechanism through which IRAs can be captured in practice and how they have been measured by literature. On the one hand, it focuses on the influence of the IRAs' daily activities by governments and political parties, mostly by exploring mechanisms of patronage. Hypothesis aimed at explaining variation in political interference is also outlined. On the other hand, and following a similar structure, it explores the questions related to the undue influence of the regulated industry.

Chapter VII measures the influence of both politicians and the regulatees. Because of the nature of the data, the influence of both stakeholders is not analyzed separately. The chapter is structured into three parts, corresponding to moments in which the influence of politicians and regulatees can be exerted. The first part examines the inputs, i.e., the professional and political profile of appointed board members, tracing whether each individual has prior experience in political office, politically appointed offices in public administration bodies, in the regulated industry or does not have any affiliation with the previous categories. The second part traces the career options of board members after leaving the regulator. It conducts descriptive and multivariate analysis on an original database of board member appointments. Chapter IX continues to query the politicization and industry capture in practice but from an exploratory perspective. It analyses the risk of undue influence at the throughput level, using data on dismissals, budget freezes and

appeals of IRAs decisions. Since we were unable to collect data for all the agencies for the period in question, we will only make some exploratory inferences and links to previous hypotheses. Further evidence-based research is needed to understand the risks of regulatory capture at the throughput level.

In the concluding chapter, the findings on *de jure* and *de facto* of independent regulatory agencies and the risks of capture Portuguese regulators face are summarized and discussed. These paragraphs are followed by a reflection upon the implications of the findings for both theory and practice for different streams of literature – regulation, party politics, and good governance. Furthermore, it also reflects on the implications for public policy, in the fields of good governance and austerity policies.

CHAPTER I THE REGULATORY STATE AND ITS INSTITUTIONS

“One important solution of the commitment problem consists in delegating policy-making powers to institutions such as independent central banks and regulatory agencies”

(Majone 1997: 153)

1.1. Introduction

Regulation has been on the political agenda for decades. The emergence of the European Union and its institutions as the ultimate ‘Regulatory State’ (Majone 1994), the waves of privatizations and liberalizations of the 1970-90s, as well as the diffusion of the independent regulatory agencies (Jordana et al. 2011) and their democratic legitimacy (Majone 1999; Thatcher and Sweet 2004) were prominent in the public and academic debate for long. Later, the agenda was occupied by the burdens of regulation, regulatory reform and the need to find “better regulation”, which became a new policy field for international organizations such as the OECD, the World Bank and the European Commission (Bunea and Ibenskas 2017; Lodge and Wegrich 2012). More recently, an accumulation of regulatory failures (Lodge and Wegrich 2012), of which the financial crisis was the most severe example, diverted the debate to the crisis of regulation (Lodge and Mennicken 2014), the relevance of regulatory agencies (Eyre et al. 2016) or the pertinence of their independence (Jordana and Rosas 2014).

This chapter begins by defining regulation: why is it needed as a governance tool and which instruments it makes use of to become effective. The nature of market failures and their relationship with regulation are also addressed. It moves on to explain the process of evolution from the Positive to the Regulatory State. Then, the nature and diffusion of

independent regulatory agencies are discussed, as well as the challenges they pose to representative democracy. Finally, the regulatory failures and challenges are debated, opening the way to the discussion about regulatory capture, developed in the next chapter.

1.2. Defining and Understanding Regulation

Markets work in a dynamic relation between business stakeholders and consumers. Market failures can jeopardize public interest and universal access of citizens to certain basic services or benefit certain groups in extracting rents. This is why regulation exists, to mediate the space between service providers and consumers. Regulation, defined as “intentional use of authority that affects the behavior of a different party” (Black 2001: 19) by public or private actors, emerged as an instrument to correct those market failures and ensure public interest. In other words, it is “the use of legal means as a tool of public policy, [...] requiring third parties to comply and carry the cost of complying” to the rules (Lodge and Wegrich 2012: 2).

Market failures can be of different nature: insufficient provision of public goods for citizens, power or natural monopolies, rent seeking behavior or negative externalities, such as environmental pollution. Monopolies often lead to reduced output, higher prices, and transfer of income from consumers to producers (Baldwin et al. 2012: 16). They can be corrected by increasing competition, for instance, through the introduction of antitrust and rules. Natural monopolies are more challenging. They are created when economies of scale available in the production process are so large that it becomes less costly to society to have production carried out by one firm than by many (Baldwin et al. 2012: 16). Also known as utilities, network industries and frequent natural monopolies are public service sectors, such as energy, telecommunication, transport and water. Rent seeking behavior is another form of market failure. Rent seeking is an attempt to secure income by manipulating the environment in which economic activities occur, namely but not exclusively through natural monopolies. It results in reduced economic efficiency through misallocation of resources, obstacles to wealth creation, loss of state revenue and may contribute to the increase of income inequality and national economic decline (Pereira 2008). It is on the basis of the Theory of Regulatory Capture, which is further developed in chapter III of the present thesis.

Regulation is composed of three features: standard setting, behavior modification and information gathering (Lodge and Wegrich 2012: 13-14). Standard setting is about designing and implementing rules. In state-based regulatory regimes, rules may be comprehensive legal frameworks created by political powers or narrower and specific ordinances designed by administrative bodies. In management-based regimes, rules are defined by self-regulatory bodies. Modifying behavior means that rules are enforced, and stakeholders comply with those rules. Finally, information gathering demands monitoring the functioning of the market and the alteration of the undesired behavior by market agents. The collected information may then lead to a feedback loop through which rules may be improved or renewed.

There are different modes of regulation, depending on the characteristics of the sectors, but also on economic, political and administrative traditions. The most common regulatory models are described as follows:

- *Self-regulation*: It often involves a business or professional association, which designs its own rules and then supervises and enforces them on its members. Although there can be some level of government monitoring or control of the regulation, self-regulation is often regarded as a way of businesses avoiding public or political intervention. This is a common model for some professions and the early days of the financial markets, for instance.

- *Incentive-based regulation*: An incentive seeks to change the behavior of companies through policies, rules, pricing mechanisms or procedures. It is based on a logic of penalties for negative behavior and rewards for good, defined by public authorities.

- *Market-based mechanisms*: There is a range of market-based mechanisms that can be used to regulate activities. Market-based regulations can prove cost effective and minimize regulatory interference in the day-to-day operation of companies. It is similar to incentive-based regulation, but the rules are not defined by any public body.

- *Command and control*: Also known by its acronym C&C, it is the imposition of standards supported by legal sanctions if the standards are not respected. Legislation defines and limits certain types of activity or enforces some actions. Standards can be set either through law or regulations issued by non-majoritarian bodies with a certain degree of independence, which are empowered to define rules.

1.3. From the Positive to the Regulatory State

The economic intervention of the State has three main and cumulative objectives (Majone 1997: 140-1), whose relevance varies over time and according to economic views and conditions:

- Income redistribution, i.e., resources transfers from one group of individuals, regions or countries to another and the provision of certain good, such as education, social benefits or health services;
- Macro-economic stabilization, aimed at achieving and sustaining satisfactory levels of economic growth and employment;
- Market Regulation, in order to correct various types of market failures.

The period that followed the Second World War was symbolized by the Welfare State. It was oriented towards those first two main objectives, the direct provision of collective social benefits through public policy programs, notably redistribution and broader macroeconomic objectives such as full employment (Majone 1997; Scott 2014). To fulfil its responsibilities, the State had at its disposal public ownership of key sectors, the direct provision of benefits services financed through general taxation, statutory foundations which gave politicians and state officials a substantial degree of discretion over delivery (Scott 2004, 2014). A strong and centralized public sector coexisted side by side with a more dispersed private sector. During the 1970s and 1980s, the welfare model was put under stress, mostly due to fiscal crises that forced governments to cut public expenses in public services. In addition, international competition increased and economic and monetary integration within the European Union progressed. The 1973-75 economic recession marked the end of the Thirty Glorious Years of economic growth based on state-led investment and the (re)emergence of neoliberal thinking, mostly pushed by

Reagan and Thatcher governments in the US and the UK, arguing for economic liberalization (through privatization, deregulation, and free trade), new public management (through a business- and customer-oriented administrative reform) and a minimalist state (by rolling back the state from the economy in order to give room for the private initiative).

Eventually, European governments were forced to change their traditional modes of governance and paved the way to a series of regulatory reforms, namely privatization of state-owned companies and services, liberalization of former monopolized sectors and the emergence of multilevel governance with the globalization of the economy and the rise of supra-national authorities, like the European Union institutions. There was a growing reliance on private stakeholders for the provision of public services, particularly utilities. Private (or privatized) companies took the lead in economic sectors that were previously reserved to state monopolies and promoted competition among themselves and/or with remaining state-owned companies. The result was a functional change of the state, i.e., a progressive reduction of the positive, interventionist state towards an increased role as a regulatory state (Majone 1997). Levi-Faur (2005) talks about an entire regulatory capitalism, which has been diffused globally. There was not a full replacement of one model with another. Depending on the political and administrative traditions and the variety of capitalism in place, both models coexist at different levels in various countries. Braithwaite (2000) posits that the redistributive state already resorted to regulation and that it was a “new regulatory state” that emerged after the 1970s. This new state aims at accommodating the existing multi-level governance and the varieties of regulatory models. Nonetheless, some features of the welfare state changed significantly with the rise of the regulatory state (Majone 1994; Levi-Faur 2005). One of those key changes was the goal of public policy and administration: rulemaking became a tool of public policy that required third parties to comply, with the objective of increasing market efficiency, the promotion of competition and the protection of citizens and consumers (Christensen et al. 2008; Lodge and Wegrich 2012: 2).

The Regulatory State can be defined by six major characteristics (Levi-Faur and Gilad 2004, Levi-Faur 2005, 2011):

- The bureaucratic function is separated from the service delivery. The state withdraws from direct service provision (due to privatizations or concessions of public services to private business) and the regulatory functions increase in salience (figure I.1).

- The regulatory tasks of the government are separated from policy-making functions. Regulators are placed at an arm's length from their political principals and are legally granted independence, which reinforces the notion of "apolitical" policy making (figure 1.1).

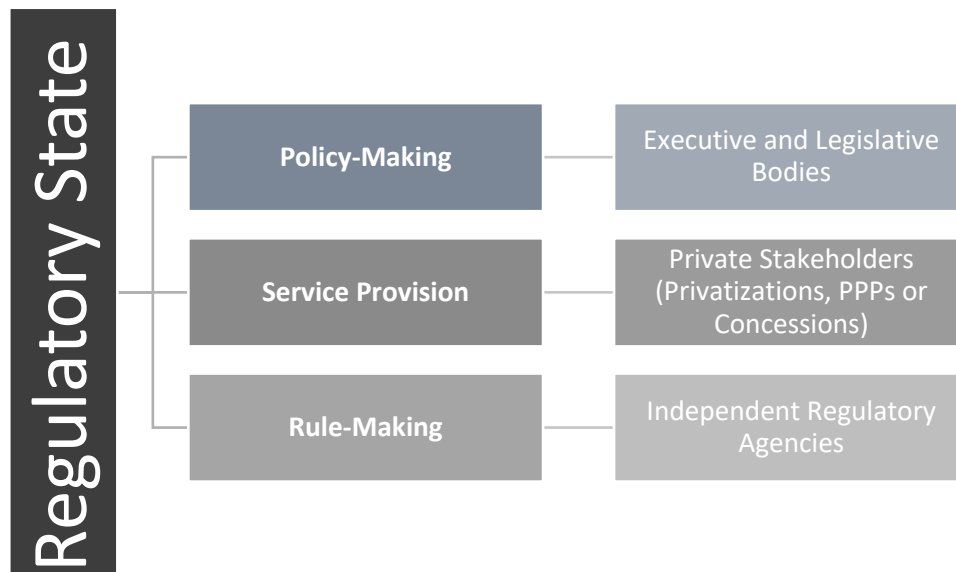
- Regulation and rulemaking become a separate stage in the policy-making process and, hence, create a distinct professional and administrative identity from the traditional central public administration.

- The arms-length relationship between regulators and the industry or other stakeholders become based on formal rules and contracts, leaving behind former close and informal relationships.

- The proliferation of new technologies of regulation and an extensive search for improved instruments of governance, namely the so-called "smart regulation" and "better regulation."

- The Regulatory State as a multilevel and international player. Regulators become part of a regional and global network of experts.

Figure I.1. Division of Functions within the Regulatory State



1.4. Independent Agencies: The Institutional Side of the Regulatory State

The concept of Regulatory State aligns itself with the views of the (not so new) New Public Management (Tom Christensen and Lægreid 2005), a new theoretical approach based on the application of principles of private sector management to public administrations (Hood 1991; Hood and Jackson 1991). Throughout the 1990s, a wave of reforms of the public sector were based on these views, aiming at improving the quality and efficiency of public services (Hood 2001). One of these principles was the unbuckling of functions, i.e., regulatory activities were separated from operational ones and policymaking from implementation (Christensen et al. 2008:15). Central public administrations were transformed into a decentralized and “horizontalized” public sector, with the disconnection of policy design, implementation and evaluation (Tom Christensen and Lægreid 2006; OECD 2002; Pollitt and Bouckaert 2011). The disaggregation of structures led to the creation and proliferation of autonomous bodies, the so-called agencies or *quangos* (Flinders and Smith 1999; Pollitt and Talbot 2004) or non-majoritarian institutions (Thatcher and Sweet 2002), the latter also covering

supranational governance bodies, such as those of the European Union, into what has become known as a process of “agencification” (Christensen and Laegreid 2007).

The Regulatory State has not escaped the “agencification” phenomenon. Indeed, its institutional translation is the Independent Regulatory Agencies (IRAs), defined by Majone (1997) as entities “created, by legal means, as independent administrative authorities, i.e., without hierarchical administrative control exerted by any direct public administration bodies” and, as such, “enjoy considerable autonomy in decision-making”. Acknowledging the difficulty of encompassing different legal doctrines, due to the diffusion of agencies across countries, Thatcher (2002) suggested the following working definition “an IRA is a body with its own powers and responsibilities given under public law, which is organizationally separated from ministries and is neither directly elected nor managed by elected officials”, to which Maggetti (2007) added the existence of regulatory powers.

Independence is critical to ensure the proper functioning of the market for all stakeholders, whether they are market agents, consumers or even the state. IRAs must be independent from the regulated sector and its companies to guarantee the impartiality of their decisions and, thus, fair competition. They are also expected to be independent from their political principals, i.e., the executive and legislative powers, as a way to cease once and for all the link between the state and the economic sectors it previously owned and managed. The aim would be to prevent undue or resourceful state interventions that could be used to benefit political actors, namely through measures and decisions aimed at attaining electoral gains at the expense of the well-functioning market. IRAs represent a compromise between the government, as the policymaker, and market stakeholders. They later have the guarantee that regulation is not subject to political cycles and potential regulatory instability. The former ensures that the state retains some level of control over market failures and the universal provision of services of public interest, despite its retreat from the economy as the monopolist owner. From the point of view of politicians, the delegation of powers to independent agencies, which are not subject to political control, may appear more controversial and less appealing. Nevertheless, governments chose to do so and the literature offers some rationales for that delegation of power:

- *Blame-shifting and cost transfer*: the political and electoral costs of unpopular decisions (rises in prices or lack of responsiveness to crisis, for instance) are transferred from elected officials to the agencies, which are not subject to direct accountability of voters (Weaver 1987; Hood 2002; Egan 2004);
- *Guarantee the technical nature of decisions*: By nature, agencies have the expertise and the know-how which politicians and governments do not (Majone 1997);
- *Credible Commitment*: by transferring regulation to independent agencies, governments re-ensure potential investors and business stakeholders that there will not be political interference in rulemaking and supervision or decisions subject to political cycles. The technical and not political nature of agencies reinforce that commitment (Kydlund and Prescott 2007; Spiller and Levy 2014);
- *Overcome information asymmetries*: one of key problems of regulation is that authorities possess less information about the industry and the market than stakeholders, so they face challenges when drafting rules, but especially when supervising compliance to those rules. The argument in favor of IRAs is that, because of they are experts in the sector, they also have significant amount of know-how, thus reducing the information asymmetries with the industry (Thatcher and Stone Sweet 2002).

As other non-majoritarian institutions (Thatcher and Sweet 2002), the relevance and powers to produce or shape public policies granted to IRAs raised concerns about their legitimacy and accountability. As Majone (1997) explains, “[b]ecause decisions of independent regulatory agencies have a differential impact on individual and group interests, in which some gain more than others, their decisions can be understood as having a political dimension. Within democratic states, public officials empowered to make politically sensitive decisions are considered to do so on behalf of the electorate to whom they should be responsive and accountable. Yet the insulation of independent regulatory agencies from direct ministerial control often generates claims that they lack a democratic mandate for their decisions [...]”. In other words, regulatory decision-making

often encompasses politically sensitive issues and the need for an equilibrium between, for instance, market efficiency and supply concerns with social and environmental goals (Baldwin, Cave, and Lodge 2012). The power to take such decisions is being transferred to entities that are not elected or responsive to elected representatives. Thus, from a democratic perspective, IRAs have an impact on the quality and extent of citizenship rights and has been considered by many a threat to liberal democracy (Lodge 2004), as they may represent a confiscation of the engagement of citizens in the debate, definition and practice of public policies and in the democratic control of technical and scientific interference and its consequences (Michel et al. 2019). Indeed, the complexity and technical aspects of current social and political issues hamper the understanding of citizens and, sometimes, of their elected representatives. Accordingly, Yeung (2010) added that IRA's legitimacy entails two apparently contradictory elements, independence and accountability. Both can become incompatible and generate a "an enduring tension in the history of regulatory governance" (Baldwin et al. 2012).

These reservations were not, however, shared by IRAs enthusiasts. Majone (1999) posited that the legitimacy of agencies derives from their technical capabilities and efficiency in the resolution of market failures. Therefore, their decisions will not have a political nature, but simply a technical one. This technical nature provides credibility to public policies and political choices. In addition, their competences are limited to well-defined objectives which they must fulfil, demanding from the agencies a certain degree of responsibility and reinforces their legitimacy. Thatcher (2002) added that IRAs have brought more transparency to the decision-making processes because they make more information available. To those that question the democratic legitimacy of IRAs, given that they are not responsible towards voters, Thatcher replies that the nomination of its members is made by elected officials, such as members of parliament or the executive. He also defends that, in the field of public policies, regulatory agencies have conquered their place, regardless of the political power that established them. The introduction, by the agencies, of open consultations procedures has opened a new way for different actors to intervene in decision-making processes, namely international investors and other competitors. This openness will, in Thatcher's view, weaken the links between governments and privileged companies.

1.5. The Diffusion of Independent Regulatory Agencies

Despite the lack of consensus in the literature, the establishment of independent regulators became a major trend in the field of regulation. The number of IRAs has increased dramatically during the last few decades (Gilardi 2005, Thatcher 2002). Between 1990 and 2002, among 49 countries, over 20 agencies were created per year, with a peak of over 40 between 1994 and 1996 (Levi-Faur 2008). The Regulatory State has indeed spread over countries and regions (Levi-Faur 2005), regardless of the administrative tradition (Bianculli et al. 2013) or variety of capitalism in each setting (Guardiancich and Guidi 2015). In Portugal, for instance, the first independent regulator, the Securities Market Commission, was created in 1991. Twelve years later, there were over ten other IRAs. The trend is similar in other European countries. The United Kingdom has eleven IRAs, France has seven, Germany and Italy have six, most of them created between 1980 and 2000 (Thatcher 2006). The model also expanded to Latin America, where the number of IRAs exploded between 1990 and the early 2000 (Jordana 2011), only to have a global reach by the mid-2010s (Jordana et al. 2018). The model has also been extended to the social fields, besides the economic. If the first agencies were set up to regulate utilities, competition or the financial sector, a second group of IRAs was created to promote public interest goals, such as environmental protection or food safety. In addition, the first group of IRAs witnessed an extension of their responsibilities towards social regulation, namely guarantees of universal access to utilities services. Finally, the number of multi-sector agencies is growing significantly (Jordana and Levi-Faur 2010).

Building on the theoretical rationales in favor of IRAs, as thoroughly explained above, international organizations, such as the Organization for Economic Cooperation and Development (OECD) and the European Commission, backed the diffusion of the model, through direct channels. The widespread trend of privatizations and liberalizations, often promoted by the European Union, paved the way to the creation of national regulatory agencies, as governments need to show their credible commitments to these policy choices. In fact, it has been found that the majority of IRAs were established in times of significant market changes (Thatcher and Sweet 2002; Gilardi 2002). In addition, IRAs were also product of coercive isomorphism (DiMaggio and Powell 1983), i.e. imposed

by EU competition law, particularly in the electricity and telecommunications sectors.⁵ Europeanization was not, however, the only explanatory factor for the diffusion of the IRA model. IRAs have also been regarded as a product of policy diffusion (Gilardi 2005b), particularly at the regional level (Fernández-i-Marín and Jordana 2015), mimetic isomorphism (Radaelli 2000), as they served as institutional model of other countries and sectors, which explains their global diffusion.

While the model has been widely diffused, not all agencies enjoy the same degree of independence. In its seminal work, Gilardi designed an index aimed at measuring the formal independence granted by lawmakers to regulatory agencies. Formal independence is stated in the public law that rules each IRA and is translated in different elements, such as the board, the budget, among others. Gilardi defines it as a “series of prescriptions, enshrined in the constitution of agencies, which should guarantee independence from elected politicians” (Gilardi 2002). It reflects what political representatives were willing to delegate at the moment of the establishment of the IRA. Depending on the political system, it reflects a compromise between different political groups or the interests of a single political party at a given time, which may have consequences on the degree of independence granted to an agency. The findings reinforced the results found in relation to the establishment of IRAs. The more independent entities are those operating in sectors that have been subjected to processes of privatization or liberalization (due to the need to project credibility) and/or subject to Europeanization processes (Gilardi 2002, 2005, 2007). Agencies set up in social sectors – such as environment, for instance – are not as independent as the ones of economic nature, as motivations for politicians to delegate power were not as strong.

However, as literature noted, independence in the law is not the same as independence in practice (Chistensen and Laegreid 2005, Maggetti 2007, Hanretty and Koop 2013). The distinction is relevant because the relationship between the two forms of independence may not be a direct one. While *de jure* holds a strong influence on informal independence, it does not explain it entirely. As Lægreid and Christensen (2007) point out, despite the theoretical development of the concept, “the degree of compliance with independence in

⁵ For further explanation, please refer to Gilardi 2005, who lists a number of EU directives on electricity and telecommunications.

order IRA remains an empirical question" that is worth measuring and evaluating. Practice depends on various factors, namely the reading of the law, by both principals and agents. It may also vary over time (Smith 1997).

1.6. Failures: A Crisis of the Regulatory State and its Institutions?

As previously explained, regulation was created to solve the market failures and IRAs were established to supervise compliance with the rules and enforce them. Progressively, the concerns over the legitimacy of the independence of regulators were overcome, as theoretical justifications for their existence multiplied and, in practice, the model as being globally adopted. Over the years there was a “growing sense of crisis in regulation” (Lodge and Weyrich 2012: 4) and key ideas around regulation became increasingly confused and contested. Some argued that citizens and their political representatives were increasingly being marginalized in several key areas of governance and that conventional democracy was giving way to “expertocracy” and “technocracy” that competed against parliament’s and people’s sovereignty (Burns 2004, Ferreira 2014). Moreover, they warned against the risks created by this new scenario, namely lack of transparency and accountability of these new regulatory agencies towards citizens, which may lead to power abuse and new forms of corruption (Burns 2004).

Some experiences with privatizations and liberalization were not always successful or achieved the expected results. For instance, the UK Rail privatization had unintended consequences (Grantham 2002) and the British Petroleum began having more accidents after privatization (Porter 2013). The privatization of water production in the United Kingdom also did not result in an absolute efficiency advantage (Dore et al. 2004). In Portugal, tariffs for consumers skyrocketed after the privatization of airports⁶ (Rodrigues 2014) and the liberalization of the fuel market did not lead to so-expected price reduction (Gonçalves, 2013). The 2008 financial crisis only exacerbated this feeling of market failure, mostly because of its worldwide effects, and eventually progressed to a sense of regulatory failure.

⁶ Rodrigues, N. (2014). “Companhias Aéreas Dizem Que Aumento Das Taxas Chegou a Um Limite.” Antena 1. Retrieved from https://www.rtp.pt/noticias/economia/companhias-aereas-dizem-que-aumento-das-taxas-chegou-a-um-limite_a783595 (accessed on 1st September 2019);

Inevitably, questions were raised: Was regulation well designed? Has de-regulation gone too far? Were regulated captured by the industry they regulate or instrumentalized by the politicians, who should stand at an arms-length? Are regulators accountable enough and to whom? Existing regulatory regimes have been accused of endless problems: lacking sufficient technical expertise, of being over-responsive to political and economic interests, of being unable to deal with unintended consequences or unforeseen events, of generating unintended burdens on citizens, NGOs, business, and taxpayers (Lodge and Mennicken 2014). Agencies have also undergone a futility crisis, as they have not been powerful enough to tackle undesired behavior (Lodge and Mennicken 2014). If faith in expertise and the quality of the outcomes had been an important rationalization for the delegation of power to regulators such as agencies (Majone 1997), then the failure of that know-how and negative outcomes raise once more questions of legitimacy over IRAs. When searching for explanations for this growing sense of crisis, many retrieved to an old and slightly forgotten theory on regulation: the regulatory capture.

CHAPTER II - REGULATORY CAPTURE

“The commonality they share though is the need to maintain their integrity through independence – both from government and those they regulate – avoiding undue influence and ensuring the decisions they make are fair, well-reasoned and evidence-based. It is a complex space to negotiate and a difficult path to tread”.

(Committee on Standards in Public Life 2016: iii)

2.1. Introduction

In the previous chapter, we offered an overview of the rise of the Regulatory State and the creation of the independent regulatory agencies, which now have been diffused globally. We explained that independence from the regulated industries and the political power was a crucial feature of these bodies, which were expected to be impartial, apolitical and of a technical nature, but raised concerns over their accountability and democratic legitimacy. And while these concerns were left in the background for a while, especially because some accountability mechanisms were eventually introduced, consecutive crises in regulated markets raised new and old debates about IRAs.

The first part of the debate refers to the question of whether a given crisis was a consequence of regulatory failure or not. Some argue that crises are inherent to capitalism and regulation on its own cannot avoid it,⁷ as it might have been the case of the 2007-

⁷ For an overview of the several possible causes of the financial crisis, see for instance Jickling, M. (2009). Causes of the financial crisis, Cornell University ILR School. Retrieved from https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1605&context=key_workplace (accessed on 20th September 2019).

2010 financial crisis.⁸ In other cases, crises might occur due to unexpected or uncontrollable causes, such as natural disasters or technical breakdowns. The Gulf Oil Spill due to the Deepwater Horizon in 2010 was at first attributed only to a technical failure.⁹ The long-lasting landline cuts in Portugal after the 2017 wildfires could also be regarded as a simple consequence of a natural disaster.¹⁰ However, these simple explanations may not be sufficient and regulatory failure may be part of the problem. Regulatory failure can occur because i) rules were ill-designed – at the legislative or agency level; ii) supervision was not properly conducted; iii) enforcement was not effective or sanctions were not applied, thus letting rule-breakers escape non-compliance and stimulating the continuation of violations or risky behavior. Finally, some have considered that regulatory failure can be, at least partially, explained by the occurrence and sometimes prevalence of regulatory capture. The financial crisis was the culmination of a series of crises, which were linked to regulatory failures. The capture of regulators was advanced as one possible explanation for these failures, but not without controversy. Many commentators claimed that not all crises are caused by capture and that the theory was outdated (Carrigan and Coglianese 2012, Carpenter 2014). However, as Daniel Kaufman (cited by Lodge and Mennicken 2014) explained, "there are multiple causes of the financial crisis. But we cannot ignore the element of capture in the systemic failures of oversight, regulation, and disclosure in the financial sector".

In the present chapter, we explain how regulatory agencies relate to their political principals and the regulated industry and how these two blocs may try to interfere in regulatory activities. Then, we discuss the concept of regulatory capture, how the theory has evolved and adapted to new economic, political and regulatory realities. Finally, we offer an overview of capture mechanisms and propose a way to make an empirical use of the theory.

⁸ The exact dates of the financial crisis vary according to the literature and, particularly, its geographic origin. The financial crisis broke out in 2007 in the United States but only reached Europe in a significant way in 2008. These differences also had an impact on the end of the crisis – for American literature, it ended in 2009 and for European commentators, it did so a year later.

⁹ For more information, please consult for instance Robertson and Krauss (2010). Gulf Spill Is the Largest of Its Kind, Scientists Say. The New York Times, 2nd August 2010. Retrieved from: <https://www.nytimes.com/2010/08/03/us/03spill.html> (consulted on 20th September 2019).

¹⁰ For more information, please consult Lusa (2018), Incêndios: Três meses após os fogos, ainda há aldeias em vários concelhos sem rede fixa, Dinheiro Vivo, 13th January 2018. Retrieved from: <https://www.dinheirovivo.pt/outras/incendios-tres-meses-apos-os-fogos-ainda-ha-aldeias-em-varios-concelhos-sem-rede-fixa/> (consulted on 20th September 2019).

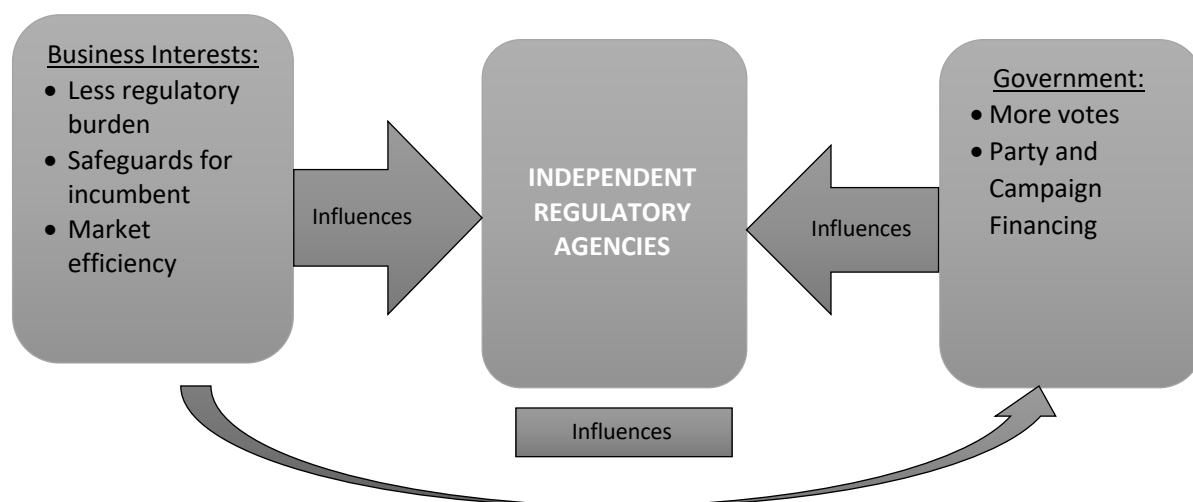
2.2. Independent Regulatory Agencies between Influences

As explained in the previous chapter, regulatory agencies stand in the middle of two sources of influences: political power and business stakeholders (figure II.1). Some posit that independent agencies should be close to those affected by their policy decisions, to gain credibility and decrease information asymmetry. The inclusion of stakeholders, for instance, would favor consensus and exchange of knowledge in policymaking at the post-delegation stage of EAs (Borrás et al. 2007: 586). There are risks to such close relationships, however. Businesses aim at reducing regulatory costs as much as possible or directing regulation towards their particularistic interests. The regulatory burden can refer to tangible administrative costs such as time, bureaucratic complexity, human and financial resources, but it may also mean non-tangible costs, such as anxiety due to the likelihood of litigation, uncertainty due to the pace of change and a sense of inequity and differentiated treatment. Companies alone or the industry sector as a whole may also want to steer regulation in ways that will benefit them, such as the extraction of rents or the adoption of certain rules that will avoid technological efforts. Politicians, despite having agreed to transfer some of their powers to IRAs, they may wish to retain a certain degree of influence over the regulators. They may wish to influence regulation for the benefit of consumers (at the expense of businesses) to secure more votes, for instance by preventing price increases. They may also be the second target of business influence in seeking friendlier regulation. In this case, politicians may act as proxies of businesses and interfere in the institutional design of the agencies or their activities, in exchange for political financing or similar benefits that allow them to increase their political gains.

The possibility of interference by these two blocs is the reason why IRAs are granted independence. Independence is critical to ensure the proper functioning of the market for all stakeholders, whether they are market agents, consumers or even the state. It is expected that the IRA will have the capacity and the will to manage both political and business attempts to influence their decisions. On what concerns the regulated parties, independence is essential to ensure equal treatment of the various market participants and, consequently, fair competition. Regarding the political power/politicians, independence is a way to cease once and for all the links between the state and the economic sectors it previously owned and managed. The aim would be to prevent undue or unwanted state interventions that could be used in order to benefit political actors, namely through

measures and decisions that could represent electoral gains at the expense of the well-functioning market.

Figure II.1. The Flows of Influence over IRAs



2.3. Regulatory Capture, a Concept in Progress

When one or both sides can influence regulation for their benefit and at the expense of public interest, we might be in the face of regulatory capture. Both types of undue influences represent the same incident – the betrayal of the nature and essence of regulatory agencies, i.e., their independence and neutrality which aimed at guaranteeing a fair market and public interest. Also known as an interest group model, the theory of regulatory capture was mostly developed by George Stigler. The author posited that as a starting point all regulation is a product of capture and is not in the defense of the public interest: "As a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit" (Stigler 1971: 3), but is more focused on rules produced by politicians than on agencies. The literature – most frequently on economics – has advanced broad and narrow definitions of regulatory capture. Carpenter and Moss (2014: 13) define regulatory capture as "the result or process by which regulation, in law or application, is consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry, by the intent and action of the industry itself". Dal Bó (2006) has developed the two types: the broad one regards it as "the process

through which special interests affect state intervention in any of its forms", while the narrow one defines regulatory capture as "specifically the process through which regulated monopolies end up manipulating the state agencies that are supposed to control them". The former is closer to the traditional definition of state capture, while the latter relates more to our specific topic – regulation. However, this one assumes that capture only takes place when there are monopolies, which is not necessarily be the case, as it will be further explained below. The concept of regulatory capture has evolved over time and has been adapted to the evolution of markets, but also of the rules of the democratic society. It may also happen in the case of cartels, to protect a specific special interest or to benefit political actors, whether it is a political party or solely the incumbent politicians. Wren-Lewis (2010) proposed a combination of both broader and narrower understandings of capture, which includes simultaneously both public and private "capturers". The author focuses "on the manipulation of government agencies regulating network industries by special interests" (Wren-Lewis 2010). The author recognizes that the group most commonly identified as capturer are the regulated firms, but the scope of his definition covers executive and legislative decision-makers (Wren-Lewis 2010).

Capture is regarded as a negative phenomenon because it causes unwanted effects in the economy, namely (Wren-Lewis 2010; Miguel and Gonçalves, 2014):

- Extraction of Rents: the extraction of an unfair income, by the captor, subtracting them from the other agents, thus jeopardizing the welfare economics.
- Price distortions: the diversion of rent is usually achieved by stipulating a non-optimal price for the good or service marketed by the companies in the regulated sector. Thus, the economic efficiency of the market is being reduced.
- The costs of capture itself: efficiency can also be reduced because of the capture diverts resources that could be used in improving company performance.
- Policy costs to combat capture: a form of capture is to give regulators sufficient incentives not to allow themselves to be captured, including property, which implies costs. Thus, resources are diverted from other fields to combat capture.

According to Stigler's views, politicians seek re-election and therefore political and financial support from business, to whom they have to offer beneficial regulation in return. Therefore, they produce regulation that pleases and benefits those who can grant them that support – the regulated companies. Taking stock of Stigler's theory, others argued that it was likely to be a series of interest groups each with competing interests (Posner 1974, Peltzman 1976, Becker 1983), further developing what became known as Interest Group Theory. From the side of the regulated companies, the benefits that could be obtained by favorable regulation are those that can constitute a rent, namely direct financial subsidies, entry barriers to new stakeholders in the market, rules that limit the production of goods that are similar to those of the benefited company and price-fixing (Stigler 1971).

Another stream of thought, the Toulouse School represented by Laffont and Tirole criticized these views, claiming that the key issues were the agency problem and the information asymmetry between regulators and firms. According to the authors, in the absence of such asymmetries, regulated firms would not be able to secure rents and hence would have no incentive to influence regulation (J.-J. Laffont and Tirole 1991: 1090). Likewise, voters and lawmakers would not find it difficult to control their agents, such as regulatory agencies, that could not get away with decisions that favored some interest groups over the public interest (Laffont and Tirole 1991: 1090). However, in practice, because agents (regulators) hold information that their principals (politicians/citizens) do not, they can let themselves be captured by the industry. Another stream is based on the life-cycle argument. It posits that regulatory regimes are built under strong public attention leading to tougher measures and more zealous regulators (Bernstein 1955). Martimort (1999) argues that at the time of their creation regulatory agencies are subject to strict scrutiny from both the government and the general public. Given this scrutiny, the agency is under significant pressure to act in pursuit of public interest. However, over time, public attention diverts to other issues and the regulators' activities are no longer under the spotlight. Thus, as the initial public pressure over the agency to act in the public interest decreases over time, the influence of the various interest groups remains constant and takes up the space of the public opinion. Given this evolution, over time, the regulator becomes more permeable to the pressure of the various groups thus more likely to be captured. In a study over the power of the Food and Drug Administration in the US,

Carpenter (2010) argues the opposite, claiming that over time regulators build a reputation and legitimacy that reinforces their power and their independence.

Table II.1. Summary of the Different Streams of the Theory of Capture

Streams	Main Authors	Main arguments
Interest Group Theory	Chicago School: Stiegler (1971), Posner (1974), Peltzman (1976), Becker (1983)	The industry creates regulations to protect the status quo and maintain benefits. Thus, all regulation is, to a certain extent, a product of capture.
Information Asymmetry	Toulouse Laffont and Tirole (1990)	Agencies are capture because they possess less information than the industry.
Life-Cycle of Agencies	Bernstein (1955), Martimort (1999)	As time goes by, regulators are less under public scrutiny and thus more likely to be captured by interest groups.
Reputation	Carpenter (2010)	Over time regulators build a reputation that reinforces their power and their independence. Thus, if it occurs, capture is more likely to take place in the early life of the agency.

The overview of the evolution of the theory is crucial to grasp the current understanding of capture, how it occurs and how it can be detected and measured. If at its early stages, capture meant that all agencies and all regulation were in the hands of the industry all the time. The most recent literature, however, has a more elastic understanding of the concept and draws a line between major types of capture that necessarily resort to different mechanisms to be effective. Legal and illegal capture emerge as the main divide, with the latter amounting to corruption as a legal offense (i.e. bribery, traffic of influence, abuse of privileged information), which this research does not deal with. On the one hand, there is what some call traditional and corrosive capture (Moss and Carpenter 2014) and others simply refer to materialist capture. In this case, regulators cash in, one way or another, through bribes, jobs in the industry after office.

Carpenter and Moss (2014: 11), for instance, claim that “to the extent capture exists, it prevails by degrees rather than by its presence or absence.” Hence, the authors distinguish between strong and weak capture (Carpenter and Moss 2014: 13):

- *Strong capture* violates the public interest to such an extent that the public would be better served by no regulation at all in activity in question or by a comprehensive replacement of the respective policy or agency.

- *Weak capture* occurs when the influence of business interests compromises the capacity of regulation to enhance the public interest, but the public is still better served by the existence of regulation.

Wren-Lewis (2010) proposes additional dichotomies of capture:

- *The capture of decisions and information*: For the purpose of our research, we will focus on the former, as it is the one that involves regulatory agencies. According to Wren-Lewis, “capture of decisions” means the “direct influence of interest groups on decision-makers [which] would, for example, include the regulated firm bribing the regulator to set a higher price in any rate or not to enforce a particular regulatory statute”;

- *Ex-ante and ex-post capture*: In the former, the interest group influences the design of regulation, while the ex-post capture happens when legislation is already in place; this feature is particularly linked to the de jure and de facto dimensions of independence that will be analyzed in the next section.

- *Legal and illegal capture*: the former may mean, for instance, lobbying or job offers, while the latter relates to coercion or forms of corruption.

- *Direct and indirect capture*: the interest group may attempt to influence the agency directly or via an alternative power.

From the point of view of the regulator, capture occurs due to two possible reasons. The first is the material self-interest of the regulator, who opts for selected policies to benefit companies other than the public (Levine and Florence 1990). The material rewards can be bribes, but may also come in a less illegal format, such as future jobs in the industry or politically appointed positions. The second reason is often known as cognitive capture or cultural capture, in which regulators do not act motivated by materialistic self-interest, but because they share the same views and believes as the industry. As the American Federal Reserve explained, cognitive regulatory capture occurs when "those in charge of the relevant state entity internalizing, as if by osmosis, the objectives, interests, and perception of the reality of the vested interests they are meant to regulate" (Willem Buiter cited by Kwak 2014: 78). Referring to the same phenomenon, Kwak (2014: 79) prefers to use the expression cultural because "it operates through a set of share but no explicitly stated understandings about the world" and capture because "it can produce the same outcome as traditional capture – regulatory actions that serve the ends of the industry" and "can occur parallel to the traditional materialist channel".

2.4. Politicization, Another Form of Agency Capture

The literature on regulatory agencies frequently applies the concept of capture to the relation between those entities and the regulated and not between the former and the government. When studying the influence of business interests over agencies, as we have outlined, literature has coined the term capture. This is, for instance, the approach of the Committee on Standards in Public Life: it refers to "a threat to independence" when discussing the relationship between the government and the regulators but uses the term regulatory capture when addressing the relationship between the regulators and the regulatees. (Committee on Standards in Public Life 2016). More recent studies have acknowledged the fact that agencies can also be captured by their principals or, in the terminology of the literature, be politicized (Ennsner-Jedenastik 2016b; Fernández-i-Marín et al. 2016). Alternative terminology has also been used, such as regulatory opportunism or capture by the political sphere to refer to when politicians abuse regulatory powers for their own purposes (Boehm 2013: 3). In fact, governments also have good reasons to try to influence the behavior of agencies, after delegation.

Executives implement the policies they presented in their electoral manifestos through the bureaucratic apparatus (Blondel and Cotta 1996, 2000; Katz 1986; Mair 2008; Rose 1969, 1974; Thomassen 1994). An effective government is thus one that can implement public policies demanded by its voters and the channel to do so is through the bureaucracy. In other words, "Politicians make decisions, bureaucrats merely implement them" (Committee on Standards in Public Life 2016). The failure to deliver has public approval and electoral costs for political parties. Despite blame-shifting being one of the motivations of politicians to delegate power to IRAs, it may also happen that an agencies' decision is controversial or not so popular among voters, namely the rise in prices, and that reflects negatively in support for the party in power. Therefore, besides designing the legal framework in a way that is more favorable to their interests, politicians have at their disposal an alternative (or additional) mechanism to control agencies: via their politicization, i.e. the introduction of political elements in what are generally considered to be insular or apolitical government bureaucracies (Page and Wright 1999; Pollitt and Bouckaert 2011, Aberbach, Putnam, and Rockman 1981; Peters and Pierre 2004, 2; Rouban 2003). When public bodies are politicized, they will tend to benefit governments and/or political parties in office or more easily follow their instructions, which is particularly concerning in entities that are expected by essence to operate outside the political realm and the umbrella of politicians. Politicization is a very comprehensive term, covering a wide range of practices at the politics-bureaucracy nexus, namely the appointment, retention, promotion, or dismissal (if possible) of bureaucrats based on political criteria (such as party-ideological or personal affinity to the principal) rather than merit be inclined to favor their principals with the expectation of being nominated to public offices, once they leave the regulator.

2.5. Detecting and Measuring Risks of Capture

In this thesis, and contrary to what Stigler posited in the 1970s, we follow the line of the most recent literature that "regulatory capture is not an all-or-nothing affair" (Aberbach Joel D. et al. 1981), it is a continuum (Rex, 2018: 3) and, despite existing, its occurrence is not systematic (Carpenter 2013). The empirical evidence on the causes and consequences of capture is scarce" (Dal Bó 2006: 220) and are frequently based on case

studies. It has been suggested that preventing or limiting capture has become a distinct possibility for social sciences research (Carpenter and Moss 2014).

Corruption is the original capture theory (Novak 2014), as it is often defined as an “abuse of entrusted powers for private gains”¹¹, and bribes, as a legal offense, are the most obvious forms of capture. However, literature has explored other more complex forms of corruption that are not criminally liable. Institutional corruption, for instance, has been described as an influence, financial or otherwise, within an economy of influence, that weakens the effectiveness of an institution, especially weakening public trust in that institution (Lessing 2010). Yet, regulatory capture does not necessarily imply that regulators are corrupt or lack integrity, but that there are incentives that facilitate it and promote it, namely information asymmetries or the desire of regulators to preserve future career options (Zingales 2014). This is why literature has distinguished two other forms of capture: the materialistic and the already mentioned cultural capture. The materialistic or financial capture takes when the motivation of the regulatory agent is of material nature (Boehm 2013). It can amount to bribes, but also political donations or future jobs in the industry or politically appointed offices. Non-materialistic or cultural capture involves the social identification of regulators with the regulated industry or the political party (Kwak 2014). Moreover, even though it is challenging to prove capture, some situations and mechanisms increase the likelihood of that happening. Identifying different mechanisms through which regulatory capture occurs and measuring risks and vulnerabilities can result more adequately and efficiently to study it. Such mechanisms (table II.2.) may not necessarily prove the existence of capture per se, but dramatically increase the chances of occurring.

From a methodological point of view, it comes as a challenge to distinguish mechanisms and signs of capture. For instance, offering a job in a political office or the regulated industry is a capture mechanism. Identifying an individual who has taken up such a job can be an indication of capture, but it does not necessarily prove undue influence was exerted. In an empirical study, (Thatcher 2002) uses three indicators that the regulator has been captured: (i) the number of regulator executives who have served in the industry,

¹¹ This is the definition used by Transparency International, as it can be confirmed here: <https://www.transparency.org/what-is-corruption#define> (Accessed on 18th August 2019)

which may indicate the level of relationship between the regulator and the regulated; (i) the manner in which market competition is regulated; (i) the number of legal disputes generated by decisions of the regulator, suggesting a certain hostility with the regulator, demonstrating that there is no catch.

Table II.2. Mechanisms and Respective Types of Capture

Mechanisms	Level/Types of Capture	Capturer
Institutional Design	Ex-ante, direct and indirect, legal	Politicians and the Industry
Appointment of Board Members	Ex-ante, cultural, direct and indirect, legal	Politicians and the Industry
Lobbying	Ex-ante, ex-post, cultural, direct, legal	Industry
Revolving Doors	Ex-ante, ex-post, materialistic, cultural, direct, legal	Politicians and the Industry
Bribes	Ex post, direct, illegal	Industry
Financial and Managerial Interference	Ex post, direct, legal	Politicians

Chapter IV, on research design and methodology, and empirical chapters VI, VII, and VIII further develop the discussion about identification and measurement of capture, as well as a description of mechanisms and indicators.

CHAPTER III - PORTUGAL, A GOOD STUDENT?

“Portugal's economy - an express train at risk of derailing”

(Bugge and Gonçalves 2019)¹²

3.1. Introduction

Regulatory reforms vary widely across regions, countries, sectors and, of course, over time. As Levi-Faur (2004: 177) has observed, "variations are clearly visible in the timing of the reforms" and countries show a specific profile. He further explains that it is possible to identify the pioneers (like Britain), fence-sitters (such as Germany), laggards (for example France), those countries that moved forwards after severe economic crises with the encouragement of international organizations (in Latin America, for instance) and those who were more proactive (New Zealand), nations that adopted reforms in several sectors (Bolivia) or just a few (such as Japan) (Levi-Faur 2004:177). Logically, the risks of regulatory capture may vary depending on these different processes and traditions of regulatory reform.

When it comes to regulatory studies, including the processes of agencification, most studies tend to focus on large economies or advanced democracies. Southern Europe in general and Portugal, in particular, are understudied. Yet, claims of capture and malfunctioning of regulated markets are frequently voiced in the public arena, leading to intense debates about the legitimacy, independence, and accountability of regulatory bodies. Portugal was an early adopter of IRAs, inspired by the British model, whilst

¹² Bugge and Gonçalves (2019), Portugal's economy - an express train at risk of derailing, Reuters, 15th February 2019. Retrived from <https://www.reuters.com/article/us-portugal-economy-analysis/portugals-economy-an-express-train-at-risk-of-derailing-idUSKCN1Q41RR> (accessed on 20th September 2019).

having an administrative tradition closer to the French case and Germanic legal culture. It was proactive in certain sectors (Jordana et al. 2006) but only advanced a wide-ranging reform after being hit by a severe financial crisis that resulted in an international bailout. On what concerns the political context, Portugal, like neighboring Spain, is a hybrid case (Jalali 2007). Contrary to most of its western European peers, both countries were recent democracies at the time of their accession to the EU. However, they now enjoy well-established regimes, as the other European partners. The singularity of the Portuguese case is also reinforced by the degree of public intervention in the economy. On the one hand, its profile is similar to the French one, i.e. an *étatist* model in which governments have extended powers and IRAs show a high degree of ministerial dependence (Roy 2000). On the other hand, over the past three decades, it has been through significant waves of privatization of utilities and public sector services, in a way that resembles the United Kingdom.

In this chapter, we explore the profile of Portugal from the perspective of its political/party system, the legal and administrative traditions, the variety of capitalism and their impact on regulatory reforms (conf. table III.1). Then we proceed to analyze the claims of regulatory capture and the shortcomings in the functioning of markets and IRAs.

3.2. Portugal, a Short Profile

From a political point of view, like other Southern European countries, Portuguese political parties became the dominant actors of the democratic process. The various governments have been controlled by three political parties, the Socialists (PS) and the Social-Democrats (PSD), the latter frequently in coalition with the Christian-Democrats (CDS), forming the so-called "power arch" or "executive arch". There is, indeed, a domination of the parliamentary majority by the cabinet in the office, which is in turn controlled by the winning political party. It is possible to sustain that Portuguese political parties have become hegemonic in the political system, especially PSD and PS, given their monopoly in government and their control over policy-making and political appointments (Lobo 2000). On what concerns administrative tradition, Portugal displays a Napoleonic model. As summarized by Kickert (2011: 807), the Napoleonic model's features are: i) the nation-state is united and the state serves the general interest; ii) the

administration is centralized, hierarchical, uniform, accountable and controlled; iii) the administration consists of highly trained and qualified civil servants, who are organized in professional 'corps'. In line with this definition, the Portuguese state is centralized and has a strong reliance on the law as a means of control of the bureaucracy (Wright 1990, Wunder 1995, Ongaro 2008, Peters 2008).

The state apparatus in Portugal shows clear signs of politicization in its different branches. This political party domination is also distinguishable in State's structures, whose resources have been used in the process of party consolidation (Morlino 1998). Since the transition to democracy, political parties used patronage as a twofold power strategy: to control key institutions (Lobo 1996) and secure support and protect party loyalists (Cerezales 2003; Jalali 2007; Jalali and Lisi 2009). Positions in the public administration are distributed as awards to supporters (Jalali 2007; Lobo 2000; Portas and Valente 1990). Patronage has been considerably strong in top positions of the bureaucracy (Silva 2013) and has been used by parties as a means of control over it (Jalali et al. 2012). Due to a process of agencification, in the past few decades, the state's structure has outgrown to an indirect administration, comprised of several bodies that enjoy more or less autonomy towards central command and political tutelage: public institutes, public companies, and regulatory agencies. This State expansion, to which one should add the existence of golden shares in strategic privatized companies, has increased the number of entities and positions to which party members and supporters can be appointed to. There are, in fact, several former cabinet members and party supporters that have taken senior positions in public companies (Azenha 2011, Louçã et al. 2014).

Table III.1. Summary of the Portuguese Model in the Literature

Literature/Tradition	Category
Political Tradition	Consensual democracy with stable executive rule and stable party system
Legal tradition	Legalist and Formalist
Administrative Tradition	Napoleonic
Varieties of Capitalism	Mixed Market Economy/ Mediterranean Market Economy

Grounded in the Varieties of Capitalism literature, some authors have considered Portugal a mixed-market economy, because both unions and trade associations show levels of coordination that are higher than in liberalized economies but lower than in coordinated ones (Hall 2014; Hall et al. 2019). Other have even placed the country in the subgroup of the Mediterranean model of capitalism (Amable 2003), characterized by “insecurity without competitiveness”, “low per capita GDP and high risks of poverty and social exclusion” (Burroni 2016: 21, as cited by Morlino and Raniolo 2017: 89). Table 2 shows relevant international indexes that, comparing with other EU countries, help draw Portugal's profile in terms of the business environment. Except for Greece, another bailout country, Portugal lags behind the other key European economies in the Doing Business and the Global Competitiveness rankings. And only Greece and Spain lose to Portugal in the Corruption Perception Index. These results suggest that, in comparison to its European peers, the country does not offer attractive business conditions or economic results.

Table.III.2. International Business Indexes

Country	Doing Business (2018/2019)*	Global Competitiveness 2018-2019**	Corruption Perception Index 2018 (score)***
Portugal	76.62/76.55	4.57	64
France	76.3/77.29	5.18	72
Germany	78.9/79.9	5.66	80
Greece	68.2/68.08	4.02	45
Spain	77.61/77.68	4.70	58
United Kingdom	82.32/82.65	5.51	80

*Source: World Bank (2019); **Source: World Economic Forum (2019); ***Source: Transparency International (2019).

3.3. The Portuguese Regulatory State

Portugal arrived relatively late at the Regulatory State, which almost grew side by side with the Welfare State. In fact, in the Portuguese recent history, as explained by Alexandre et al. (2016: 47), the State takes up the central role, having been the driver of the most important social and economic transformations. Notwithstanding the liberal economic trends that preached a smaller and less interventive role, in Portugal, the state grew exponentially. The Welfare State consolidated and led to the increased in the size of the civil service, the universalization of national health and education service and the remarkable growth of social security expenses (Alexandre et al. 2016). Concurrently, the State also boosted its presence in the economy through the State's Business Sector (SEE)¹³ and Public-Private Partnerships (PPPs).

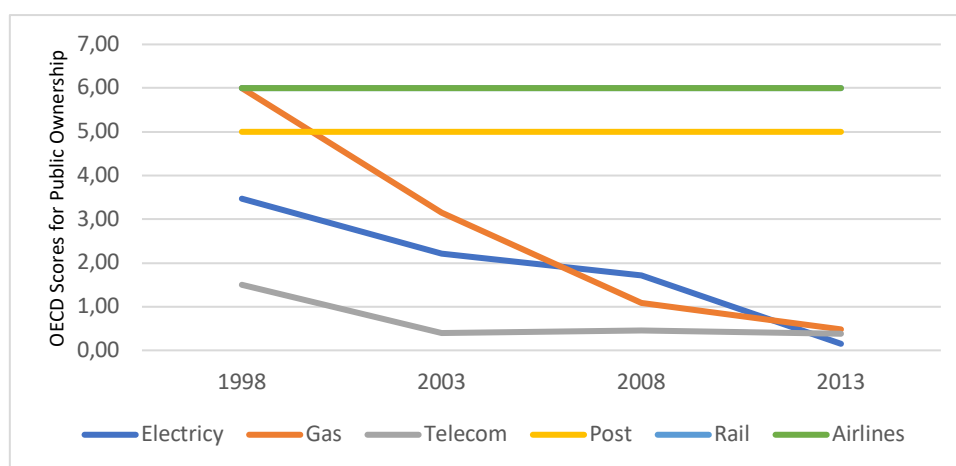
The 1970s were, in fact, a decade of nationalizations, as a consequence of the 1974 Carnation Revolution, in an economy that was dominated by private companies, although concentrated in just a few hands (Baklanoff 1996). The majority of nationalizations took place in 1975 and reached around 1300 companies, including some in strategic economic sectors, such as banking institutions, oil, industry, and transportation (Correia and Rosário 2011). Around 1988, Portugal was the country with the largest public business sector among OECD states (Baklanoff 1996:934). However, during the 1980s, the role of State in the business sector began to be questioned, due to the influence of European policies and new ideological trends (Confraria 2005: 413), which were enhanced by actual changes in the balance of power in the political system. The Council of the Revolution¹⁴ was extinct and the influential role of the Communist party decreased to the benefit of the moderate parties, the socialists and the social democrats (see, for instance, Rosas 2006). Three years after joining EEC, the re-privatization of many of the nationalized companies began taking place, reflecting the constitutional amendment of 1989 and these new economic trends. In fact, the government conducted a serious “reform in institutions, economic regulation and the functioning of the economic mechanisms” (Lopes 1996: 41).

¹³ A translation from the official Portuguese denomination “*Sector Empresarial do Estado*” (SEE)

¹⁴ From 1975 to 1982, the Revolutionary Council was a sovereign body with revolutionary legitimacy and powers of constitutional oversight. It was composed by the President of the Republic, Chief of Staff of the Armed Forces (CEMGFA), military chiefs of the three branches, the Prime Minister (if he is military) and 14 officers - eight from the Army, three from the Air Force and three from the Navy, as well as members of the National Salvation Board and State Council.

Between 1993 and 2003, the Portuguese economy underwent the most intense process of privatization in the EU, averaging 23 percent of GDP, which was twice the percentage of the United Kingdom, for instance, known for being a "big privatizer" (Clifton et al, 2006: 743). In the following years, the country still belonged to the OECD group of countries where privatization of services of public interest carried a greater weight (33%), very close to the numbers of the more liberal United Kingdom (44%) (Rodrigues and Adão e Silva 2012). The sale of state-owned companies followed the British model: a public offer would be launched with a percentage of shares for workers and small investors, another share for big investors and, in some companies, a "golden share" was reserved for the State (Rocha and Araújo 2006: 16). Figure 3.1 shows the degree of public ownership of utilities in Portugal overtime and the diachronic privatization processes.

Figure III.1. Degree of Public Ownership of Sector in Portuguese Economy



Source: self-elaboration based on the OECD Product Market data

Note: The data collected by OECD stops in 2013. In the meantime, airlines and mail were partly privatized.

The maintenance of the golden shares, which secure special rights to the state and the appointment of a government's representative on the board of companies, was justified for matters of national interest.¹⁵ Some have claimed, however, that golden shares were also a way of appeasing those political clienteles that feared to lose their places in the

¹⁵ Law no 11/90, of 5th April, art. 15º

state apparatus (Rocha and Araújo 2006: 16) or have pointed out that public companies end up suffering from excessive political interference (Baklanoff, 1996: 937).

After having been nationalized in the aftermath of the 1974 revolution, the financial and insurance sector was one of the firsts to be privatized.¹⁶ This paved the way for traditional family and business groups, who had been removed from power in the 1970s, to reorganize themselves around the industry and the banking sector (Lopes 1996: 41; Costa et al. 2010: 270). This was how the largest private companies emerged and consolidated. First, they are a result of the banking and industry concentration of the nationalization processes of the post-revolution period. Second, they are an outcome of the privatization of those monopolies created in the 1970s (Costa et als 2010: 276). Privatizations expanded to several sectors, namely utilities but were a long and gradual process that has lasted beyond the second decade of the 21st century (conf. figure 3.2).

Figure III.2. Privatization Revenues per Year in Millions of Euros



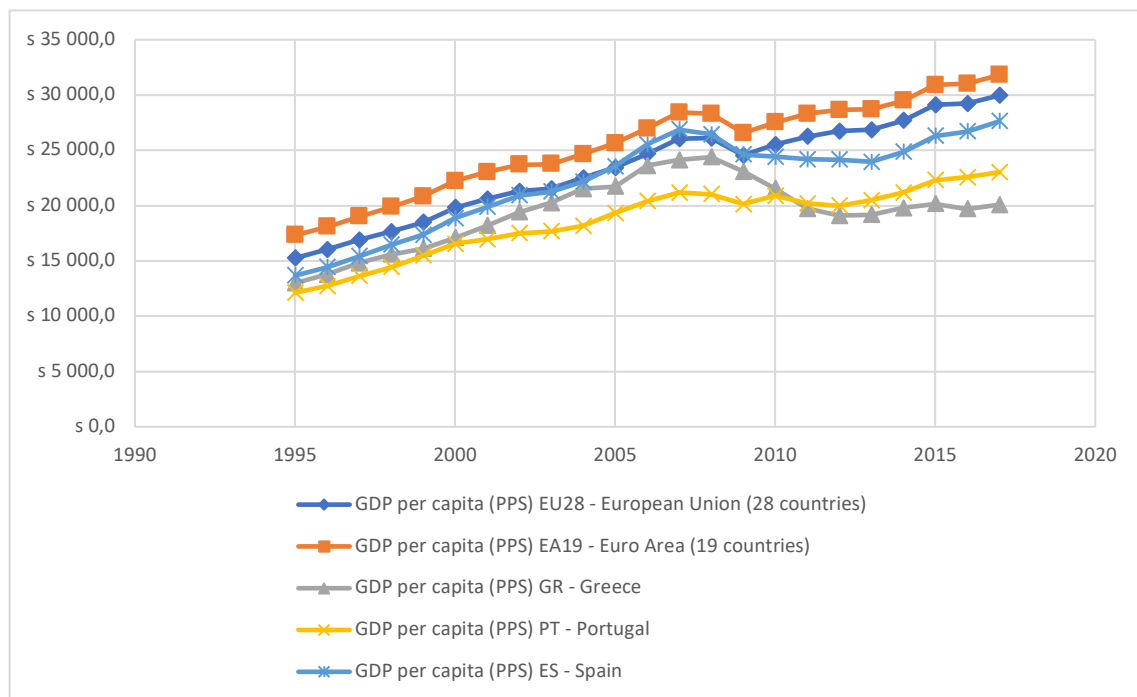
Source: Rosa 2013

For many years after the accession in 1986, Portugal was overall considered “the good student” of the European Union in what concerns economic integration (Braga de Macedo 2003). The end of the 1990s slowed down both the economic performance (as shown in

¹⁶ The process began with the privatization of *Banco Totta e Açores*, *Aliança Seguradora*, and *Tranquilidade*.

table 3.3) and the optimism over the Portuguese success. Despite the positive results of the 1980/90s, the Portuguese economy arrived at the 21st century with glaring delays in terms of social and economic infrastructures, as well as in the industrial sector (Costa et al. 2010: 433). In fact, Portugal has proved to be far from being a success story of regulatory capitalism. The country has not been able to overcome its status as an economic, social and political periphery (Reis 2018: 31). As table 3.3 and figure 3.3 show, economic growth began slowing down, even compared to its southern neighbors. As Reis (2018: 59) posits, “growth was no longer a trajectory and became a question of moments. Instability became the norm.”

Figure III.3. GDO per Capita (PSS)



Source: Pordata

Table.III.3. GDP per capita Growth (average annual rates at constant prices, percentages)

	Portugal	Spain	Greece	Ireland	Europe*
1973-1986	1,52	1,31	1,75	2,47	2.01
1986-1998	3,45	2,65	1,39	5,42	1,88
1998-2009	1,00	2,8	3,3	3,5	1,31

* It includes Belgium, Denmark, France, Germany, Italy, Netherlands, Norway, Sweden, and the United Kingdom

Source: Costa, Lains and Miranda 2012

Notwithstanding the intensity of the privatizations, by 2011 Portugal was the fifth country with the largest share of employment in the SEE in the overall employment, among the OECD countries, with the financial and the transportation sector amounting to over 50% of the total and the utilities making up 0,8% (Alexandre et al. 2016: 61). The institutional and legal frameworks struggled to respond to the economic challenges. The country was an early adopter of the IRA model, particularly in the utilities sector (Jordana et al. 2006), as the creation of independent regulators was simultaneous with the privatization and liberalization processes of the 1990s, due to the influence of EU law and/or the initiative of certain ministries (Garoupa and Rossi 2005, Rocha and Araújo 2006). However, the agencification process was somewhat prolific and disorganized, without a dedicated legal framework (which would only arrive for the regulators in 2013) (Garoupa and Rossi 2005: 447). The legal framework came across as largely inefficient and inadequate for the needs of the economy, lagging behind the majority of the EU member states, including its Southern European peers (Garoupa and Rossi 2005).

Eventually, the global crisis hit Portugal and uncovered many of its fragilities. In 2011, amidst the sovereign debt crisis that was striking Europe, the Portuguese government was forced to request international financial assistance for the third time in thirty years.¹⁷ According to Bloomberg calculations, the 37.8 billion dollar bailout was the third biggest in the history of the International Monetary Fund, exceeded only by Argentina in 2018 and Greece in 2010.¹⁸ The *Memorandum of Understanding* (European Commission 2011)

¹⁷ Portugal had been bailed out by the IMF in 1977 and 1983.

¹⁸ Data retrieved from Bloomberg (2018), The Year in Money. Retrieved from <https://www.bloomberg.com/graphics/2018-year-in-money/>. Accessed on 20th September 2019

signed between the Portuguese government and the three institutional creditors – International Monetary Fund, European Commission and the European Central Bank – resulted in an actual economic policy program (Reis 2018: 68), which prescribed in detail the fiscal, economic and regulatory reforms the country was expected to undertake. The austerity period had officially begun, causing a severe shock in the Portuguese economy and society. In 2014, the country successfully completed the bailout program, while the economy was finally showing signs of recovery. In the following years, Portugal was once again regarded as the poster boy of the austerity policies, a successful case in the European context from both an economic and political point of view (see Fernandes et al. 2018). But has the country really overcome its fragilities?

3.4. Market Failures: a Sign of Capture?

Regulated markets in Portugal have long shown inefficiency and lack of competition. In 2010, an IMF Report stated that “non-tradable sectors also suffer from a lack of competition” (International Monetary Fund, 2010: 5), a diagnostic repeated a year later by the financial assistance program (European Commission 2011). Simultaneously, the OECD (2011: 10) advanced that “competitive pressures in non-goods sectors, such as network industries, wholesale and retail trade, ports and professional services, [were] still limited” and given that the “[o]utputs from all these sectors [were] widely used as inputs by other industries, [...] shortcomings can have wide ramifications and hamper productivity growth throughout the entire economy.” It added, for instance, that “prices in sectors such as electricity and gas have remained high, which weighs on both household purchasing power and the business sector’s international competitiveness” and that, despite “policy changes in areas such as telecoms and energy have been geared towards reducing the returns of these sectors, although there is still scope for stronger competition” (OECD 2011: 10). Three years after the end of the bailout, problems seem to have persisted. In 2017, the European Commission (2017: 11) stressed that “despite [...] reforms, policy gaps persist regarding product and services markets” and further developed the remarks about the shortcomings of the functioning of each sector, as summarized in table 4.

Table III.4. 2017 European Semester Assessment

Sector	European Commission assessment
Banking	Progress in the financial sector (CSR4) remains limited (pp. 12); Portugal's banking sector compares rather unfavorably with most of the euro area countries when it comes to efficiency figures (pp.27);
Energy	The elimination of the electricity tariff debt and phasing-out of regulated prices are taking longer than initially planned. (pp.48) Limited electricity interconnection with the EU and fossil fuel subsidies remain a barrier to decrease overcapacity in the energy system. (pp.49)
Water and Sewage	Waste management impedes more efficient resource use. Portugal underperforms in terms of waste management. (pp.49) Portugal has witnessed a vast improvement in water infrastructure but is lagging behind in terms of asset management efficiency and economic and financial sustainability. (pp.50)
Land and Maritime Transportation	Performance indicators for Portuguese ports remain low in international comparison. (pp. 49) Restrictions on the operating of long freight trains in port rail access remain, decreasing the efficiency of both rail and maritime transport. (pp.50)

More concrete examples follow. According to Eurostat, Portuguese households pay the most expensive electricity in Europe and the fourth highest prices in gas (Eurostat 2019). The telecommunications sector shows similar results: Portugal ranks 8th in the list of prices in the EU and, while prices of services have been decreasing in most of the EU countries, they have been consistently increasing in Portugal in the past years (ANACOM 2019), while complaints regarding the quality of the service have increased (confirm

ANACOM's website for more data).¹⁹ International aviation associations have filed a complaint with the Directorate-General for Competition of the European Union because of the private concession contract of the Portuguese airports, claiming that the constant increase of fees by the private stakeholder infringes competition laws.²⁰ The failures resulting in the financial crisis also had a significant burden on the taxpayers and the society at large. In 2018, the Court of Audits concluded that “the financial effort resulting from public intervention aimed at supporting the national financial system following the international financial crisis, which began in 2007, has been a high burden on the public purse, particularly in the context of deficit public finances (Tribunal de Contas 2018: 207). The audit report added that in the period 2008-2017, the public expenditure on the financial sector in net terms amounted to € 16 751 million (8.6% of GDP in 2017).

Alongside these general assessments of the regulated markets and competition, national and international institutions have voiced remarks over the performance of regulatory agencies. Some have claimed that, despite the institutional innovation that was the establishment of IRAs, the public regulation of markets is yet to be placed at the service of the competitiveness of the Portuguese economy (Garoupa and Rossi 2005). In 2008, when all the regulators had been already established, the Court of Audits conducted an overall assessment of regulation in Portugal and “concluded that the presence of certain imperfections in the regulatory systems in various sectors responsible for essential services interfered in practice with the exercise of independent regulation” (Moreno 2008: 15). In a chapter on competition and regulation, the 2011 electoral manifesto of the Christian-Democrats party, CDS, identifies “serious and noticeable regulation and supervision problems [...] and a tendency to protect incumbent companies” (CDS 2011). Experts and columnists frequently address the problems of the capture of Portuguese regulators, as some examples suggest:

- *“What the current situation shows us is that this indispensable independence is not guaranteed effectively. And there are legitimate concerns about transparency*

¹⁹ ANACOM (2019), Portal do Consumidor. Retrieved from <https://www.ANACOM-consumidor.pt/> (accessed on 22nd August 2019)

²⁰ Guerreiro (2018), Estado processado em Bruxelas por lucros excessivos da ANA Aeroportos, Expresso, 4th October 2018. Retrieved from <https://expresso.pt/economia/2018-10-03-Estado-processado-em-Bruxelas-por-lucros-excessivos-da-ANA-Aeroportos> (accessed on 22nd August 2019)

and the protection of the public interest when, for example, the chairman of the supervisory body overseeing the activity of insurers and pension funds is simultaneously the chairman of an association that defends the interests of the public. insurers and banks! (Bruno Dias, Member of Parliament);²¹

- *“In Portugal, the regulatory state died before it started. Successive governments have dealt poorly with the independence of regulators and have quickly decided that they are partisan spoils. [...] The capture of regulators by private stakeholders deserves some attention in the media, but far from annoying political power.”* (Nuno Garoupa, Economist)²²
- *“Often, the independence of its leaders is something hidden and not immune to partisan power logic”* (Bagão Félix, Economist and former Finance Minister)²³;

The issue of lack of competition and the inefficiency of regulation was pointed out by the three institutional creditors and took up a significant part in the Financial Assistance Program. The Memorandum of Understanding required Portugal to "minimize rent-seeking behavior by strengthening competition and sectoral regulators", particularly the ones related to network markets, namely energy, communications, and railways. Among the commitments to the creditors, the government had the obligation to "[e]nsure that the

²¹ Dias (2003), Autoridades reguladoras independentes nos domínios económico e financeiro
Intervenção do Deputado Bruno Dias, PCP, 12th February 2003. Retrieved from <http://www.pcp.pt/autoridades-reguladoras-independentes-nos-dominios-economico-financeiro/intervencao-do-deputado-bruno> (accessed on 20th September 2019).

Translated from the original: *O que a actual situação nos demonstra é que essa indispensável independência não é garantida efectivamente. E levantam-se legítimas preocupações quanto à transparência e à defesa do interesse público quando, por exemplo, o presidente do organismo de supervisão que fiscaliza a actividade das seguradoras e dos fundos de pensões é, simultaneamente, o presidente de uma associação que defende os interesses económicos das seguradoras e dos bancos!*

²² Garoupa (2016), O Estado-Regulador português style, ECO, 1st December 2016. Retrieved from <https://eco.sapo.pt/opiniao/o-estado-regulador-portuguese-style/> (accessed on 20th September 2019).

Translated from the original: *Em Portugal, o Estado-regulador morreu antes de começar. Os sucessivos governos lidaram mal com a independência dos reguladores e, rapidamente, decidiram que são despojos partidários. [...] A captura privada dos reguladores merece alguma atenção na comunicação social, mas longe de irritar o poder político.*

²³ Félix (2017), Independência dos reguladores?, Tudo menos Economia, Público, 13th March 2017. Retrieved from <https://blogues.publico.pt/tudomenoseconomia/2017/03/13/independencia-dos-reguladores/> (accessed on 20th September 2019).

Translated from the original: *E, não raro, a independência dos seus dirigentes é algo dissimulada e não imune à lógica de poder partidário.*

national regulatory authorities (NRA) have the necessary independence and resources to exercise their responsibilities.” The inclusion of such an objective and the emphasis given to the regulators’ independence suggests the existence of potential or actual capture situations. Compared to the financial assistance programs of other EU members, the Portuguese agreement showed remarkable concern over the independence of IRAs. Table 5 compares the references to the independence of national regulators in seven agreements of EU members that called for the financial assistance of the European Commission.

Table.III.5. References to IRAs in the Financial Assistance Programs of EU Member States

<i>Country (Date of Bailout)</i>	<i>Memorandum of Understanding</i>
Portugal (2011)	<p>The powers of the [energy] Regulatory Authority will also be strengthened (pp. 29);</p> <p>The effectiveness of the competition authority and sectoral regulators will be raised inter alia by revisions in the competition law, the setting up of a specialized court and the implementation of best practices in terms of independence of national regulators. (pp.30);</p> <p>State involvement in private sector activities will be reduced, and the independence of sectoral regulators reinforced (pp.55);</p> <p>Transpose the Third EU Energy Package by the end of June 2011. This will ensure the National Regulator Authority’s independence and all powers foreseen in the package (pp.84);</p> <p>Ensure more effective competition in the sector by implementing the new Directive on EU electronic communications regulatory framework ("Better Regulation Directive"), which will (among others) enhance the independence of the [Telecommunications and Postal] National Regulator Authority. (pp. 86);</p> <p>Further, liberalize the postal sector by transposing the Third Postal Directive ensuring that powers and independence of the National Regulator Authority are appropriate in view of its increased role in monitoring prices and costs. (pp.86);</p> <p>Strengthen the rail regulator independence and competences including by strengthening its administrative capacity in terms of decision and execution powers and staffing (p.87);</p> <p>Ensure that the national regulator authorities (NRA) have the necessary independence and resources to exercise their responsibilities. [Q1-2012] In order to achieve this:</p>

	<p>i. provide an independent report (by internationally recognized specialists) on the responsibilities, resources and characteristics determining the level of independence of the main NRAs. The report will benchmark nomination practices, responsibilities, independence and resources of each NRA with respect to best international practice. It will also cover scope of operation of sectoral regulators, their powers of intervention, as well as the mechanisms of coordination with the Competition Authority. [Q4-2011] (pp. 93)</p> <p>ii. based on the report, present a proposal to implement the best international practices identified to reinforce the independence of regulators where necessary, and in full compliance with EU law. [Q4-2011] (pp. 94).</p>
Cyprus (2012) ²⁴	<p>The Cypriot authorities will:</p> <ul style="list-style-type: none"> • ensure the independence and enhance the effective functioning of the Commission for the Protection of Competition and its ability to enforce effectively the competition rules by Q4-2013; and • ensure the necessary independence and power of the national regulatory authorities (NRA) and enhance their ability to exercise their responsibilities and to carry out effectively their tasks, including monitoring the competitive situation in their respective sector by Q4-2013. (pp. 97).
Greece ²⁵ (2010-2015)	Government adopts measures, in line with EU requirements to strengthen the independence and capacity of the Energy Regulatory Authority (pp. 75).
Hungary (2008-2010)	No mention of national regulatory authorities.
Ireland (2011)	No mention of national regulatory authorities.
Latvia (2008)	No mention of national regulatory authorities.
Spain (2012)	No mention of national regulatory authorities.

Source: European Commission

The nine paragraphs referring to the independence of the Portuguese regulators contrast with the two paragraphs of the Cypriot program, the single mention of the energy regulator in the Greek MoU and the total absence of references in the remaining

²⁴ Directorate-General for Economic and Financial Affairs (2013), The Economic Adjustment Programme for Cyprus, Occasional Papers 149, May 2013, European Commission

²⁵ Directorate-General for Economic and Financial Affairs (2010), The Economic Adjustment Programme for Greece, Occasional Papers 61, May 2010, European Commission

programs. This signals not only the importance IRAs represented for the Troika but also its concerns about their lack of independence.

Some years earlier, Garoupa (2005) had already warned that “from a theoretical point of view, Portugal meets the conditions that favor the capture of institutions, namely the reduced size and homogeneity of its elite, a weak and disorganized civil society, lack of accountability [...], hierarchical and stratified social and work relations and concentration of wealth”, suggesting in addition that its practical effects are noticeable. Calvete (2012: 97-8) has also stated that, given their history, economic IRAs in Portugal can hardly be an example of independence and legitimacy. On capture by the industry, there is a list of claims highlighting decisions that benefited certain firms or the industry as a whole taken by the Insurance and Pension Funds regulator (Calvete 2012: 99), by the telecommunications’ agency (Denicoli dos Santos 2012) or the Bank of Portugal (Saraiva 2015: 328-9). Intervention by the government in the sphere of regulatory agencies has also been identified and perceived as politicization and political capture. Calvete (2012: 95) has labeled some IRAs as “really a pseudonym of the Government”, as the latter frequently appoints “trustful people” to the boards. Members of agencies boards have resigned because of political interference or absence of conditions to pursue their mission.²⁶ (Dhanis 2007; Lusa 2005). In other words, claims of capture or lack of independence abound. Nevertheless, the existing literature has failed to fill the gap between the above-mentioned theoretical conditions of capture and these in numerous anecdotal stories.

3.5. Concluding Remarks

In this chapter, we have offered an overview of the Portuguese Regulatory State, which contrary to what happened in other countries, rose almost in parallel and in spite of the development of the Welfare State. It was with a strong impetus that Portugal adopted,

²⁶ Dhanis, M. (2007), “Jorge Vasconcelos Acusa Governo de Beneficiar Produtores de Energia.” TVI24. Retrieved from <https://tvi24.iol.pt/portugal/erse/jorge-vasconcelos-acusa-governo-de-beneficiar-produtores-de-energia> (accessed on 1st September 2019); Lusa (2005), “Rui Nunes Demitiu-Se Da Presidência Da Entidade Reguladora Da Saúde.” RTP. Retrieved from https://www.rtp.pt/noticias/pais/rui-nunes-demitiu-se-da-presidencia-da-entidade-reguladora-da-saude_n13125 (accessed on 1st September 2019).

from the late 1980s, economic liberal ideas, such as privatization of public companies, liberalization of certain sectors and the agencification of the public administration. However, various inconsistencies resulted from this fusion of Anglo-Saxon-inspired regulatory reforms with rigid and formalist Napoleonic administrative structures and a Mixed Market Economy, namely (re)privatizations with the concentration of power in a small number of family-based economic groups or market liberalization with state participation in the market through golden shares and regulatory control. The underperformance of the economy over the first two decades of the new century has exposed the vulnerabilities of the Portuguese Regulatory State. Many, from academics to practitioners, have identified problems with competition, regulation and, inevitably, the regulatory agencies. Capture has been signaled as the cause of some of these shortcomings, but only on an ad-hoc basis.

All these features of the Portuguese Regulatory State make Portugal an interesting case in the study of regulatory capture. Therefore, what we seek to do in this thesis is to fill the gap between these theoretical conditions for capture and the long list of alleged cases of political or industry undue influence. We will do so by collecting and analyzing empirical evidence that can support or dismiss those theoretical and anecdotal claims, search for trends and probabilities, as well as explanations for those findings. The following chapter describes more in-depth our research questions, objectives and methodological strategy.

CHAPTER IV - RESEARCH DESIGN AND METHODOLOGY

“If there’s one takeaway, it’s this: let anecdotal evidence drive your questions, and data analytics support the answers”.
(Primer 2018)

4.1. Introduction

In the previous chapters, we offered an overview of the current state of the art concerning the institutional aspects of the Regulatory State. In chapter one, we outlined the process that led to the creation and global diffusion of independent regulatory agencies, as well as the challenges they posed to democratic regimes and political party systems. In chapter two, we further developed the problems faced by independent regulators, focusing on the risks of undesired influence by the regulated industry and the political bodies. We did so by taking stock of the different streams of the Theory of Capture. In chapter three, we looked at the Portuguese Regulatory State, its well-acknowledged shortcomings and the claims academics and practitioners have made about the capture of agencies and the lack of adequate levels of independence. We also noted how most claims and examples are anecdotal, relating to particular situations, and justified the pertinence of identifying and measuring the risks of capture in Portugal in a more encompassing and systematic fashion. Therefore, with a multi-method approach, with both quantitative and qualitative techniques, we look for systematic evidence of risks of capture, at *de jure* and *de facto* levels. This chapter explains the design of the project and the method of research. In the next section, the research design is introduced. The case selection – Portuguese independent regulatory agencies as defined by the respective framework law agencies

and independent competition authorities – is described in the following section. Finally, the research method and design are outlined and discussed.

With a few exceptions (Maggetti 2014; Di Mascio et al. 2018), the cross-sectoral process of institutional change has not been systematically and broadly studied. Therefore, what we propose in this dissertation is a cross-sectorial and diachronic within case study analysis of the risks of capture, i.e., of eleven independent regulatory agencies in Portugal, from the mid-1990s until 2019. To empirically analyze the diachronic evolution of the risks of capture to which IRAs are exposed, as well as variation across sectors, all the regulatory agencies within one country should be taken into . Holding the context of the country constant, allow for the identification of factors that explain longitudinal and across sector variation in both de jure and de facto independence.

4.2. Objectives and Research Questions

Most works on regulatory capture are based on case studies that focus on policy decisions (Carpenter and Moss 2014). The same method has been applied in the Portuguese context (Calvete 2012; Denicoli dos Santos 2012). Demonstrating capture is a difficult and controversial exercise. First, it is necessary to decide what a bad regulatory decision is or whether it has a negative impact on the public interest. Then, it must be evaluated whether it was intentional or had other causes, like sheer incompetence. Yet, it is possible to investigate the risks of capture, i.e., whether the door is open for certain IRAs to be captured or not. Hence, the objective of this study is to understand to what extent are Independent Regulatory Agencies at risk of being captured in Portugal. To do so, we will address the following research questions:

- a) *To what extent are IRAs legally shielded from capture?*
- b) *To what extent are IRAs, in practice, shielded from the influence of the regulates industry and political principals?*
- c) *Has the risk of capture changed along the lifecycle of regulatory agencies?*
- d) *Are there sectors under a higher risk of capture?*
- e) *Which factors render regulatory agencies more prone to capture?*

Our objective is to broadly analyze the risks of capture by looking into several aspects of the nature and action of regulators and examine whether those aspects can contribute to the capture of agencies or, in opposition, can help protect them from undue influence.

4.3. Research Design

In this section, we propose an operationalization of the concept of capture, by breaking it into dimensions and identifying potential indicators for those dimensions. In one of its most important works, Bo Rothstein asked “What is the opposite of corruption?” and explained that corruption has turned out to be difficult to define and what should be counted as “the opposite” was the concept of impartiality, as the basic norm for the implementation of laws and policies (Rothstein 2014). We will follow the same logic and search for an adequate definition of the opposite of capture, i.e., the features IRAs should have to be shielded against the unwanted and/or disproportional influence of certain groups concerning which agencies should operate at an arms-length. This will then lead to the identification and measurement of risks of capture of independent regulatory agencies.

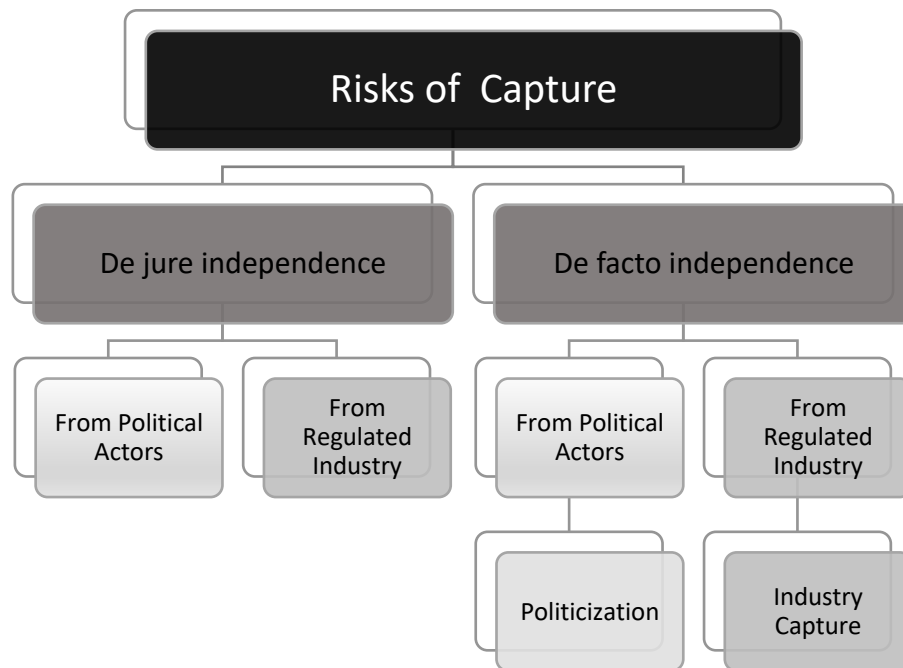
Operationalizing Capture

The working definition of capture proposed by Wren-Lewis presents itself as the most appropriate one for our objectives. The author combined of both broader and narrower understandings of capture, which include simultaneously both public and private “capturers”. Wren-Lewis focuses “on the manipulation of government agencies regulating network industries by special interests” acknowledging that the group most commonly identified as capturer are the regulated firms, but not dismissing executive and legislative decision-makers (Wren-lewis 2010). We assume that the opposite of capture is the absence of that manipulation or, even better, of the possibility of that manipulation. In other words, it is their degree of independence, also defined as their ability to make day-to-day decisions without the interference and/or consideration of those who should be at an arms-length distance (Elgie 1998: 55), i.e., the regulated industry and their political principals.

Paired with regulatory powers, independence is the fundamental feature of IRAs. Independence is critical to ensure the proper functioning of the market for all stakeholders, whether they are market agents, consumers or even the state. In what concerns the industry, independence is essential to ensure equal treatment of the various market participants, to avoid rent-seeking behaviors, and to protect fair competition, the quality of the service and the rights of consumers/citizens. Regarding the political principals, independence is a way to eliminate links between the state and the economic sectors it previously owned and managed. The aim would be to prevent undue or unwanted state interventions that could be pursued to benefit political actors, namely through measures and decisions that could represent electoral gains at the expense of the well-functioning market.

The scholarship on regulation has conducted extensive work on the independence of IRAs (eg. Gilardi 2002, 2005a; Hanretty and Koop 2012, 2013; Maggetti 2007; Thatcher 2002, among many others) and has clarified the difference between *de jure* and *de facto* independence (Christensen and Laegreid 2005). *De jure* or formal independence is the degree of independence inherent in those legal instruments which constitute and govern the agency (Hanretty and Koop 2012), while *de facto* independence means the way the agency functions in practice in its daily activities (Maggetti 2007). The link between the two dimensions is important, but may not be a direct one, as studies with contradictory results have shown (Enns-Jedenastik 2014a; Hanretty and Koop 2013; Maggetti 2007). Maggetti (2007) claims that formal independence is not a necessary or sufficient condition for independence in practice. Hanretty and Koop (2013), on the other hand, posit the former is a good predictor of the second. Finally, Enns-Jedenastik (2014a) examined the profile of board members of several agencies and concluded that the higher the legal independence of IRAs, the more board members display political party links. In summary, for the operationalization of the concept of capture, we will analyze the degree of independence from politicians and firms in two dimensions – in terms of (statutory) legal standards and institutional practice (figure 4). In the following paragraphs, we further develop the definition and measurement of *de jure* and *de facto* independence.

Figure IV.1. Operationalization of Agency Capture



De Jure Independence

De jure independence is assessed based on the public law that regulates each IRA and is translated in different elements, such as the composition of the board and the budget, among others. Gilardi defines it as a “series of prescriptions, enshrined in the constitution of agencies, which should guarantee independence from elected politicians” (Gilardi 2002), but also from the regulated firms. It reflects what politicians are willing to delegate at the moment of the establishment of the IRA. Depending on the political system, it reflects a compromise between different political groups or the interests of a single political party at a given time, which may have consequences on the degree of independence granted to an agency. As Hanretty and Koop (2012: 1999) explain, “formal independence is worth studying if we are interested in why politicians delegate power: drafting and passing a statute is the ultimate act in delegating power, in both senses.” While the authors and many others, when studying formal independence focus mainly on politicians, as they are the ones that i) delegate their power and ii) draft and pass the legal statutes, this dimension is also useful for the examination of the relationship with the regulated industry. First, politicians may decide to include (or not) in the statutes provisions that ensure some distance from industry (imposing ex-ante or ex-post employment restrictions to board members, for instance). Such an option signals already

some degree of influence the regulated firms may have over certain sectors. Second, the existence of legal mechanisms creating a barrier to stakeholders' influence work as a benchmark for the analysis of the *de facto* independence of the agency in relation to the industry. Empirically, quantitative measures on a large scale have been compiled by Gilardi (2002, 2008), Hanretty and Koop (2012a), and Bianculli et al. (2013). Their method has been similar, i.e., the examination of laws and agency statutes followed by the aggregation of information on a dozen of indicators, namely rules for appointments and dismissal of senior agency officials, accountability requirements, autonomy over budget and staff, and the extent to which an agency shares its regulatory powers with other bodies.

Because it is directly linked to the process of power delegation, the analysis of formal independence is performed in two ways in this work. In the first part, we analyze the process of the creation of regulatory agencies and the explanatory factors behind their establishment. Secondly, we measure the degree of formal independence granted to agencies of different sectors over the years and analyze its evolution and direction towards more or less independence. In this section of the dissertation, we take stock of the widely used Gilardi's formal independence index (Gilardi 2002, 2005a), but using an adapted version that is more adequate to the objective of measuring risks of capture. Further explanation of both the original index and our adaptations is provided in chapter VI.

De facto independence

De facto independence, on the other hand, means "the self-determination of agencies' preferences, and their autonomy throughout the use of regulatory competencies" (Maggetti 2007). The distinction is relevant because, while *de jure* holds a strong influence on informal independence, it does not explain it entirely. Practice depends on various factors, namely the reading of the law, by both principals and agents. It may also vary over time (Smith 1997). As Christensen and Laegreid (2007) point out, despite the theoretical development of the concept, the degree of compliance with independence in order IRA remains an empirical question that is worth measuring and evaluating. Besides, the assessment of independence must always be perceived from two angles, i.e. the political power and the economic interests it regulates, as both forces are interested in

capturing the regulator for their benefit (Thatcher 2005). With regards to the independence from the regulated, it should be noted that, since the mechanisms of formal independence are established by the political principal, politicians can prescribe them to benefit themselves and also the regulated. In this case, political and economic power do not have conflicting interests among them that would need to be balanced by the regulator, but in fact, they keep a close and mutual benefiting relationship, that encourages them to act jointly. In an extreme scenario like this, regulatory entities would just be playing a make-believe role. The analysis of de facto independence focuses particularly on the profile of the board members, as a key factor for the degree of independence of the agencies (Maggetti 2007; Thatcher 2005). The main points of this focus are, on the one hand, the political or business links of the individuals, prior to the nomination and the magnitude of the revolving door between the political, the regulatory and the business fields of those same individuals. This option is based on three important theoretical and empirical concepts, politicization, meritocracy and revolving doors, which will be further developed in chapters VII and VIII. In addition, other indicators will be considered in an exploratory manner, namely early departures and financial restrictions.

4.5. Methodology

As advanced in Chapter III, this research is based on the Portuguese case, due to alleged claims of capture and the lack of studies over a case that shows so many inconsistencies in its regulatory model. John Gerring (2013: 5) explains that "a case connotes a spatially delimited phenomenon (a unit) observed at a single point in time or over some time", adding that "each case may provide a single observation or multiple (within-case) observations." Based on this premise, the present dissertation follows a within-case study method, analyzed through a combination of the Policy Sector Approach (PSA) with the Temporal Patterns Approach (TPA) (Levi-Faur 2004).

Within a case study

When selecting the observations, we consider regulatory agencies the bodies that were considered as such in the Framework Law on Independent Regulatory Agencies (FLIRA),

a bill that was passed in 2013, following the obligations of the financial assistance program.²⁷ According to FLIRA, independent regulatory agencies are

“public legal entities, in the category of independent administrative entities, with powers to regulate economic activity, to defend services of general interest, to protect the rights and interests of consumers, and to promote and defend competition from the private, public, cooperative and social sectors” that “[I]n order to pursue their duties independently, regulatory authorities shall observe the following requirements:

- a) Have administrative and financial autonomy;*
- b) To have autonomy of management;*
- c) To have organic, functional and technical independence;*
- d) To have organs, services, personnel, and own assets;*
- e) To have powers of regulation, regulation, supervision, supervision, and sanction of infractions;*
- f) To ensure the protection of consumers' rights and interests.”²⁸*

The FLIRA covers the agencies of the following sectors: electricity and gas, telecommunication and postal services, civil aviation, insurance and pensions funds, securities, health, water and sewage, land and maritime transportation, competition. Additionally, we selected the institutions with regulatory powers that, despite having been left out of the FLIRA, are enshrined in the Portuguese Constitution – the Central Bank, which holds banking supervisory power, and the Regulatory Entity for the Media (ERC). A brief overview of the cases is displayed in table 6. Each agency will be further explored in chapter V.

²⁷ Law no 67/2013, 28th August: Framework-Law on Independent Regulatory Agencies

²⁸ Idem, article 3

Table IV.1. Summary of the Portuguese Regulatory Agencies

Category	Sector	IRA	Year of Creation*	Political Party**	Year of statutes amendments
Finance	Securities	CMVM	1991	PSD	1999, 2000, 2003, 2008, 2015
Finance	Insurance and Pension Funds	ASP***	1997	PS	2001, 2015
Finance	Banking	BdP***		PSD	1998, 2001, 2004, 2007, 2012, 2013, 2015
Competition	Competition	AdC	2003	PSD-CDS	2014
Other	Media	ERC	2005/2006	PS	
Other	Health	ERS	2003	PSD-CDS	2009, 2014
Other	Civil Aviation	ANAC	1998	PS	2007,2015
Utilities	Electricity and Gas	ERSE	1995/1997	PSD	1997, 2002, 2012, 2013
Utilities	Communications and Postal Services	ANACOM	1981/1989	PS	2001, 2014
Utilities	Water and Sewage	ERSAR	1997	PS	2009,2014
Utilities	Land and Maritime Transportation	AMT	2007	PS	2014,2015

*Some agencies display two dates. In these cases, the first date corresponds to the year of the approval of the founding statutes and the second to the year of the de facto establishment of the agency.

** PS refers to the center-left party, PSD refers to the center-right party and CDS to the Christian-democrats.

*** ASF (the insurance and pensions fund regulator) and BdP (the banking regulator/central bank) have existed since the 19th century. However, for practical reasons, we considered the year in which ASP was granted independent status and the BdP became the banking supervisor, after the entrance of Portugal in the European Monetary Union.

The selection of the regulatory agencies that are not included in the FLIRA was more challenging. The Central Bank – *Banco de Portugal* (BdP) is the most problematic of regulatory entities that were left out of the framework law. First, since the creation of the European Monetary Union, central banks of the eurozone relinquished part of their responsibilities, namely conducting national monetary policy. Nevertheless, national central banks did not merge with the European Central Bank, and they still retain a degree of independence and discretion at the national level. The second reason that makes the BdP hard to fit in the category of a regulatory agency is the fact that its status and functions go largely beyond regulation. Traditionally central banks have responsibilities in many policy areas and were created long before the emergence of the regulatory state. However, central banks are still responsible for banking supervision, including in Portugal.²⁹ Thus, following other studies, the BdP will be considered a regulatory agency since the year it assumed responsibilities for banking supervision (Jordana and Rosas 2014: 677).

The second regulatory body not included in the framework law is the media regulator (ERC).³⁰ Despite being accountable to parliament and not directly to the executive and supervising a sector whose nature goes beyond the market, ERC is considered an independent administrative entity. On the other hand, the media sector has strong economic and political relevance. Among its powers, ERC, for instance, must ensure the no concentration of stakeholders in the media market and the regulation of media ownership.

Policy Sector and Temporal Patterns Approaches

Levi-Faur (2004: 177) explains that the general advance of regulatory reforms is beset by temporal, spatial, sectoral, national and international-level variations (see table 4.2). For our empirical analysis, we decided to combine the policy sector and the temporal

²⁹ Organic Law of the Bank of Portugal, Approved by Law No 5/98 of 31 January as amended by Decree-Law No 118/2001 of 17 April, Decree-Law No 50/2004 of 10 March, Decree-Law no. Law No. 39/2007, of February 20th, Decree-Law No. 31-A / 2012, of February 10th, Decree-Law No. 142/2013, of October 18th, art. 17th

³⁰ There are other independent regulatory agencies in Portugal, namely the Electoral Commission, the Data Protection Commission or the Access to Administrative Documents Commission. However, because they do not have economic regulatory powers, they have been considered to be outside the scope of this thesis.

approaches. The national patterns and the international regime approaches are not suitable to a within-case study method, as they do not capture what we are aiming for, i.e., an in-depth understanding of the application of a foreign concept (the pluralist and decentralized IRA).

Table IV.2. Four Common Approaches to Comparative Analysis

Approach	Cases to be compared	Predictions as to variations	Predictions as to similarities
National Patterns Approach (NPA)	Nations	Across nations	Across sectors, time and international regimes
Policy Sector Approach (PSA)	Sectors	Across sectors	Across nations, time and international regimes
International Regime Approach (IRA)	International regimes	Across international regimes	Across sectors, time and nations
Temporal patterns approach (TPA)	Politics before and after a major event	Across time	Across sectors, nations and international regimes

Source: Levi-Faur 2004

The policy sector approach emphasizes the autonomous political characteristics of distinct policy sectors, hence the multiplicity of political patterns in any single country. Cited by Levi-Faur (2004: 181), Freeman explains that "the style of policymaking and the nature of political conflicts in a country will vary significantly from sector to sector". This can be explained by the fact that, despite the common framework offered by the variety of capitalism of a given country, each economic sector has its specificities, all the actors involved influence, shape and react to regulation (Abbott et al. 2017). Moreover, external factors, such as Europeanization, may influence the characteristics of a sector and distinguish it from other less subject to those factors (Levi-Faur 2005, Gilardi 2005).

The temporal patterns approach suggests that systematic diachronic comparisons of sectors, nations, or international regimes may reveal some of the most important features and determinants of the spread of regulatory reforms. Certain 'remarkable' events serve as turning points and mark a boundary between the 'old' and the 'new' orders. The TPA

will allow testing two contradictory hypotheses advanced by the literature – the life-cycle theory vs. the reputation theory. Briefing recalling the explanation provided in chapter II, the life-cycle hypothesis posits that, as time goes by, regulators are less under public scrutiny and thus more likely to be captured by interest groups (Bernstein 1955, Martimort 1999), while the reputation hypothesis claims that, over time, regulators build a reputation that reinforces their power and their independence (Carpenter 2010; Carpenter and Krause 2012)

4.6. Data Collection and Analysis

Content analysis of official documents is central for our research, but it was complemented by secondary sources and exploratory interviews. This section describes the sources and the type of data collected and analyzed for each part of the dissertation. Table 4.3. summarizes the indicators and the source of data used to collect the data for each indicator. Table 4.4 shows the preferred sources of information, where the data was located.

In the chapters that focus on the legal aspects of IRAs – the creation and the degree of formal independence respectively chapters V and VII — the most frequently used data sources were naturally the legal statutes of the agencies, published in the Official Gazette. In addition, due to the referral to other complementing legislation or to some poorly designed or detailed statutes, it was often need to search data in other legal sources, such as general public administration laws, namely the Law on Public Institutes, the Law on Public Managers, the Legal Regime of Incompatibilities for Politicians and Senior Public Officials and the Framework Law on the Independent Regulatory Agencies (FLIRA). These legal documents were the source of the information for the filling of the indicators for the adapted *de jure* independence index.

In a subsequent phase of the analysis, in which we investigate the inputs that were incorporated in the above-mentioned laws and those proposals that were rejected, we collect and analyze documents of other nature, namely books written by stakeholders, media reports and opinion articles. Still, the interpretation of the preambles of the legal statutes was crucial to understanding the context in which they were drafted and the

drivers that pushed lawmakers to approved them. In other words, they were the basis of part of the hypothesis testing. We also collected the bills presented in parliament by the different political parties and/or the government concerning regulatory agencies. The purpose is to contrast these bills with the adopted version and understand which provisions were dropped and to what extent are the position of the different political parties different. Another type of documents was the official opinions on the matter requested by the authorities to stakeholders, the agencies themselves and legal experts. The legal documents, namely the different IRAs statutes are listed in a dedicated section in the bibliography

The second part of the empirical analysis measures the possibility of the influence of business and governments/incumbent parties in the daily activities of the IRAs. This is done in chapters VII and VIII that analyze several indicators through different methodologies. First, we measure the intensity of the revolving doors, i.e., the *ex-ante* and *ex-post* professional and political career of board members, through a multivariate analysis. Secondly, we conduct an exploratory analysis of three types of indicators for which we only have partial information: early departures of individuals, the spending freezes declared by the government with effects on the agencies and the appeals filed by the regulated firms against the decisions of IRAs.

The collection of data related to de facto independence analysis was more varied in terms of sources and more challenging. On what concerns the profile of board members and their career paths, sources were varied. The preferred source of information was the official appointment orders, as they provide data on the date of appointment, the appointing government, and minister and a summarized CV of the board member. 199 appointment orders were screened. To complement the information on the previous career of individuals, which sometimes was incomplete or even absent from the appointment order, we looked for data on institutional websites, not only of the regulatory agencies but also universities, companies, and other public organizations, where they were previously placed. However, such primary sources proved to be insufficient, particularly for identifying positions taken after leaving public office. Therefore, it was necessary to search in secondary sources, such as investigative journalism books, media outlets and professional social media networks, such as LinkedIn, and then cross-check the available

information. A few cases were left without information, which may be due to very discrete career choices or simply because of professional retirement.

With the data collected, two different databases were created. The first one lists all the professional and political jobs each board member has taken, before and after the regulated job, with entry and exit dates, as well as reasons for early departures, when it is the case and when those reasons are publicly available. This collection feeds a second database, constructed in the SPSS software, codifying each appointment. The difference between coding appointments and individuals relies on three factors. The first is that some individuals saw their mandates renewed, sometimes more than once. Separating mandates has advantages in the coding and measurement of variables. It makes a difference when coding the following variables: *term renewed*, *appointing party*, *government* and *appointing minister*, *de jure independence value* and *age of the agency*. For instance, entries 12, 13 and 14 refer to the appointments of individual X in the same IRA. This means that his/her mandate was renewed twice, by different governments, thus changing the coding in each entry. Secondly, a handful of individuals were appointed to different regulators or the same regulators at different points in time. Besides the impact on the above-mentioned variables, such repetitions also change the variables concerning the *ex-ante* and *ex-post* jobs of the individual. As an example, individual Y was appointed twice to the same agency (entries 39 and 52) and once to a second agency (entry 34). Not only did the appointing government, party, and minister changed, but the variables concerning his prior career also changed. The first time that individual Y was appointed to a regulator, the "politically-appointed office in public administration" was coded zero. However, in the two subsequent appointments, this variable was already coded one.

For the data collection referring to early departures, the first source of data were also official documents: the orders and appointing orders of the following board member (which frequently mention the former individual and the reason for replacement), as well as official statements of the respective ministry, informing the departure of the board member. In the absence of such primary sources, the data collecting was completed by resorting to the official websites of the agencies, parliamentary hearings and online media (both news and opinion articles). These sources, paired with the interviews and statements written by the former board members, were also used to identify the reasons for the departures.

The data on spending freezes decided by the government was one of the most challenging to collect. The issue gained particular relevance in late 2017, during the Costa government, as IRAs started to publicly denounce the situation³¹ and members of parliament gained interest in the management of national budget and the its impact in agencies. Such political salience led to the official request and publishing of data over spending freezes by each of the regulators, but only since 2016. In fact, statements of the IRAs suggest that there were no freezes before that date, which may not be very likely (especially given the austerity measures periodically imposed in the public administration since the early 2000s), but there is no data available to confirm this, since the IRA's annual financial statements do not offer such information. Our sources were the official replies of the agencies to information requests made by parliamentarians on budget freezes, published in the parliament's website, and the annual financial reports of 2016 to 2018, in order to calculate the share of the freezes in the overall budget. Moreover, this does not include the BdP and the ERC, because they are not subject to the government's rules and orders, including budgetary matters. Therefore, this indicator appears very incomplete, in comparison to other indicators used in this dissertation. However, given the relevance of the freezes in the political debate over IRAs and its use a source of political control with relevant implications on the independence of these oversight bodies, we decided it should be part of our analysis.

Finally, for the appeals filed by the regulated firms against the decisions of the IRAS, we used the data collected by CEDRIPE, the research institute dedicated to regulatory issues of the University of Coimbra (Gonçalves et al. 2010). The data collected only reports to the early years of the IRAs and does not cover the last decade. It was not possible to collect up-to-date data for all the agencies. Each IRA publishes its numbers in different ways, some presenting new appeals per year, while others show the accumulated number of court cases per year. In addition, more than half of the IRAs did not reply to our request

³¹ See, for instance, Saraiva, Hermínia. 2019. "AdC Acusa Governo de Violar Lei Dos Reguladores: Cativações Sobem Para 21% Do Orçamento." *ECO Online*. Retrieved from <https://eco.sapo.pt/2019/07/03/concorrencia-aplica-multas-de-136-milhoes-de-euros-cartel-dos-seguros-rendeu-12-milhoes/> (assessed on 20th September 2019) or ECO (2018). Cativações No Regulador Da Saúde Têm 'Consequências Graves', Assume a Presidente. *ECO Online*, 9TH June 2018. Retrieved from <https://eco.sapo.pt/2018/06/09/cativacoes-no-regulador-da-saude-tem-consequencias-graves-assume-a-presidente/> (assessed on 20th September 2019)

for disaggregated data. Therefore, we did not have access to reliable and comparable data on appeals filed by the regulatees for the past ten years.

Table.IV.3. Summary of Indicators and Respective Sources of Data

Indicator	Description	Source of Data
De jure independence index	A composite index composed of 3 dimensions and 20 indicators	- Statutes of agencies - Complementary legislation
Board members' ex-ante career	Categorization of the prior experience of Board members into four categories: political office, politically appointed office in public administration, a job in the regulated industry and no affiliation	- Official Appointment Orders - Agencies' websites - Professional online networks - Media reports
Board members' ex-post career	Categorization of the prior experience of Board members into four categories: political office, politically appointed office in public administration, a job in the regulated industry and no affiliation	- Professional online networks - Media reports - Official Appointment Orders (when individuals were appointed to other public offices) - Official websites of current employers, such as companies or universities (used to confirm and validate data collected in the media)
Early Departures	Whether the board member left office before the term of their mandate Reasons for leaving	- Official statements issued by the regulator or the respective ministry - Official Appointment Orders of the Replacing Board Member (in some cases it refers to why the person is being appointed)

		and why the previous person left) - Media reports - Direct sources of the individual: interviews, official statements, books they authored
Spending Freezes	Share of the spending budget that has been frozen by the Finance Ministry and can only be unblocked and spent after authorization	- Official responses were given by agencies to parliamentary inquiries - Agencies' annual reports
Appeals of IRAs' decisions by regulated firms	The number of appeals to the court made by the regulated firms of IRAs decisions per agency	- CEDIPRE Report on Regulation Litigation in Portugal: Research and Analysis Report on Public Regulation Jurisprudence (Gonçalves et al. 2010)

Table IV.4. Data Sources

Source of Data	Preferred Source of Information	Website
Official Appointment Orders	Online Official Gazette	https://dre.pt
Laws and Decree-Laws	Lisbon's General Prosecutor's Office	http://www.pgdlisboa.pt/home.php
Bills, Parliamentary requests and replies	Parliament	https://www.parlamento.pt
Media Reports	Público	https://www.publico.pt
	Observador	https://observador.pt
	ECO Online	https://eco.sapo.pt/
	Jornal de Negócios	https://www.jornaldenegocios.pt

Professional Social Media	LinkedIn	https://www.linkedin.com
Annual Reports and Official Statements	AdC	http://www.concorrencia.pt
	AMT	https://www.amt-autoridade.pt
	ANAC	https://www.anac.pt
	ANACOM	https://www.ANACOM.pt
	ASF	https://www.asf.com.pt
	BdP	https://www.bportugal.pt
	CMVM	https://www.cmvm.pt/
	ERC	http://www.erc.pt
	ERS	https://www.ers.pt
	ERSAR	http://www.ersar.pt
	ERSE	http://www.erse.pt/

In what concerns the timeframe of analysis, the data collected covers the period from 1989 until mid-2019, for both the legal statutes and the board members appointments.³² The period under review allows us to analyze ten different governments and five changes of government. Thus, the analysis described in this paper allows for sufficient variety in terms of government ideology. There are five center-left governments: Guterres I and II (1995-1999 and 1999-2002), Sócrates I and II (2005-2009 and 2009-2011) and Costa (2015-2019). The other half are center-right government formations: the single-party government Cavaco Silva II (1991-1995) and PSD-CDS coalitions of Barroso (2002-2004), Santana Lopes (2004-2005), Passos Coelho I and II (2011-2015) and the one-month long executive of 2015. There are some differences in the quality of the data collected across time and governments. Earlier appointments were harder to identify and locate in the Official Gazette and on the agencies' websites. In addition, some appointment orders, especially during the Socrates I and II did not list the previous positions of the appointees. In these cases, the alternative secondary sources were essential.

³² Please note that the first statutes of the telecommunications regulator were approved in 1981, but its regulation and operationalization kicked off in 1989.

Finally, to fill in some information gaps, to understand the dynamics behind the actor's decision-making processes and, especially, to uncover new perspectives and avenues of research we conducted ten exploratory interviews with actors that were directly linked to IRA. Nine of the individuals had been or were, at the time of the interview, board members of IRAs. Two of them had been both regulators and cabinet members. One had been a cabinet minister. The other two had been agency board members, but simultaneously experts in a given regulated sector. Despite being exploratory, the interviews followed a semi-structured method. All interviews were face-to-face (except one, conducted via email, as requested by the interviewee) and initiated after the interviewees signed a consent form, that stated the objective and purpose of the interview and their rights over the collected material. The list of interviewees, the interview guide and a sample of the consent form are in Appendix A.

Interviews were not our privileged source of information, due to the many disadvantages of this technique. The limitations of elite interviews are widely recognized, particularly those concerning participants' willingness to participate or provide the researcher with a good image of themselves or the institutions they represented, at the expense of the accuracy of the information provided. Furthermore, we wanted to distance our research from the anecdotal evidence and, to a certain extent, accusations regarding episodes of alleged interference in the independence of IRAs, that we have addressed extensively in chapter III. We collected and examined the most objective data possible and searched for patterns and probabilities. Given the potential for a controversy that our research entails, we also avoided naming individuals or particular companies. This way we avoid the personalized controversy that could take away the focus from the main results while maintaining the integrity and objectives of our study.

CHAPTER V - THE CREATION AND EVOLUTION OF PORTUGUESE REGULATORY AGENCIES

“In Portugal, the Regulatory State died before it even started.”
(Garoupa 2016)³³

5.1. Introduction

In chapter III, we had a glimpse of the functioning of the Portuguese Regulatory State and the shortcomings identified by national and international institutions. Such malfunctions identified in various evaluation reports, paired with the claims made by external evaluators and domestic analysts of regulatory capture and interference with the independence of IRA,³⁴ made us believe Portugal was a relevant case study of the measurement of risks of capture. Critics accused Portuguese IRAs of lack of independence (European Commission 2011) and some pointed out the fact that they were an innovation that was alien to the political and administrative traditions of the country, hence their unsatisfactory performance (Garoupa and Rossi 2005)³⁵.

In this chapter, we propose a more in-depth and detailed account of the lifecycle of IRAs in Portugal. First, we offer an overview of the eleven agencies chosen as objects of study, as defined in chapter IV. There is a summary of their creation and reform, as well as of the market they supervise. The description also contributes to a comparative analysis

³³ Garoupa (2016), O Estado-Regulador portuguese style, ECO, 1st December 2016. Retrieved from <https://eco.sapo.pt/opiniao/o-estado-regulador-portuguese-style/> (accessed on 20th September 2019).

³⁴ Please refer to Chapter III for further information on these claims

³⁵ See also Garoupa (2016), O Estado-Regulador portuguese style, ECO, 1st December 2016. Retrieved from <https://eco.sapo.pt/opiniao/o-estado-regulador-portuguese-style/> (accessed on 20th September 2019).

across the various IRAs, on what concerns the number of board members, their staff and their budget. In the second part of the chapter, we analyze the overall legal context of IRAs: their place in the constitutional and legal order, the failed and successful attempts to define their status within the public administration and how the political and economic context influenced those attempts.

5.2. An Overview of Sectoral Regulators

The following pages offer a summary of the most important aspects related to the regulators and their respective markets. In addition, table V.1 compares the number of board members and employees and the annual budget, according to the most recent annual reports available on the agencies' websites.

Competition Authority

Although all sectoral regulators have responsibilities of ensuring fair competition in the markets they supervise, the *Autoridade da Concorrência* (AdC) is the general competition regulator, established in 2003 by the center-right coalition in government. As of 2017, AdC had 3 board members, 93 employees and a budget of almost 10 million euros. Its statutes were amended only once, in 2014, as a consequence of the adoption of the framework law on regulators and changes on the competition law.³⁶ AdC was established after the failure of two previous bodies – the Competition Council (*Conselho da Concorrência*) and the Directorate General for Competition (henceforth DG Competition),³⁷ which shared the responsibility of implementing competition law. Created in 1993, the Competition Council was not governed by a dedicated law nor did it have specific attributions. It was part of a more general decree-law that defined a reformed competition framework.³⁸ Both the Competition Council and DG Competition shared regulatory powers, the latter with a supervisory role and the former with

³⁶ Decree-Law 125/2014 of 18th August

³⁷ Decree-Law 10/2003 of 18th January created the AdC; Decree-Law 371/93 of 29th October created the Competition Council and the DG Competition.

³⁸ Decree-Law no 371/93, of 29th October

enforcement capacity.³⁹ The division of functions proved inefficient, as the government admitted in 2003 in the preamble of the newly established AdC, which replaced the other two bodies: “organic unity is given to the functions currently divided, in not always clear terms, between the Directorate-General for Trade and Competition (DGCC) and the Competition Council, ending an experience that , in practice, proved to be a source of inefficiencies and divergences of orientation that could undermine the credibility of competition policy in Portugal.”⁴⁰

AdC's mission is to ensure compliance with competition rules, namely respect for the principles of the market economy and free competition, market efficiency, an efficient redistribution of resources and consumer protection. On what concerns market efficiency, it is expected to have a close relationship with sectorial regulators and is partly financed by their financial transfers. Despite AdC's independent status, the government may reverse a decision on refusal of a merger, on the grounds of public interest. Such a reversal has already taken place. In 2007, for the first and only time in the history of the agency, the Minister of the Economy permitted the acquisition of 40% of the shares of a road company by another, against the AdC's disapproval of the operation.⁴¹

Securities Market Regulator

The Securities Market Commission (CMVM) was established in 1991, by a center-right government, following the accession to the Economic European Community and the liberalization of the stock market.⁴² As of 2017, it had five board members, 225 employees and a budget of almost 40 million euros. Its statutes were changed in 1999 and amended four times since, in 2000, 2003, 2008 and 2015, the latter following the FLIRA.⁴³ It has the task of supervising and regulating securities and stock markets, as well as the activity of stakeholders within those markets. The range of those subject to the CMVM regulatory powers is significantly broad, from financial intermediaries and

³⁹ Idem, art. 12 and 13

⁴⁰ Decree-Law 10/2003 of 18th January, which created the AdC. Our translation

⁴¹ Ordinance no 2409/2007: Transfer of shares and joint control of Auto-Estradas do Atlântico - Concessões Rodoviárias de Portugal, S. A., by BRISA - Auto-Estradas de Portugal, S.A.

⁴² Decree-Law no 473/99 of 8th November; Decree-Law no 486/99 of 13th November

⁴³ Decree-Law no 473/99, of 8th November

independent investment advisors to investment funds, holders of qualifying holdings in public companies and risk capital companies and funds, among several other related to financial markets. The CMVM is a member of the International Organization of Securities Commissions (IOSCO), the European Securities and Markets Authority (ESMA) and the Ibero-American Securities Institute (IIMV).

Banking Regulator

Being the Central Bank, the *Banco de Portugal* (BdP) is an atypical case in the universe of Portuguese regulatory agencies. It dates back to 1846, but its supervisory and regulatory powers over the banking sector were defined by law in 1990.⁴⁴ According to the last annual report, it has six administrators, including the governor and 1755 employees. The current organic law that governs the BdP was approved in 1998 and it has been amended eight times.⁴⁵ Its legal status as a central bank is enshrined by Article 102 of the Constitution of the Portuguese Republic, and the legal framework of the European System of Central Banks. The creation of the European Monetary Union in 1992, guaranteed full formal independence to central banks in the Eurozone. The BdP, like its European counterparts, is no longer under the tutelage of the government or any other national political institution. On what concerns its role as regulator, the law grants BdP supervisory and rule-making powers over credit institutions, financial societies, and payment institutions. The current legal regime governing the *Banco de Portugal* derives from the privatization and liberalization of the financial and banking sector in the late 1980s, as well as the legal framework of the European System of Central Banks.

The role of the BdP in the supervision of banking institutions and the stability of the Portuguese financial systems since the mid-2000s has been severely criticized in parliamentary inquiry commissions (Almeida 2019; Saraiva 2015). In addition to the global financial crisis that erupted in 2007, two important Portuguese banking institutions – *Banco Português de Negócios* (BPN) and *Banco Espírito Santo* (BES) - have collapsed since then, due to illicit banking practices. Despite having gone through different

⁴⁴ Decree-Law nº 337/90, 30th October

⁴⁵ Law no 5/98, 31st January, amended by Decree-Law no 118/2001, 17th April, Decree-Law no 50/2004, 10th March, Decree-Law no 39/2007, 20 February, Decree-Law no 31-A/2012, 10th February, Decree-Law no 142/2013, 18 October, Law no 23-A/2015, 26th March, Law no 39/2015, 25th May.

processes (BNP was nationalized, while BES was split into two banks and rescued by a resolution fund), both scandals led to severe criticism over the performance of the regulator, including in inquiry committees in parliament (Almeida 2019; CPIPNGABPN 2012; Saraiva 2015).

Insurance and Pensions Fund Regulator

The ASF is the regulator for insurance and pension funds. It has three board members, 225 staff members and a budget of 18 million euros. Since its establishment in 1907 as the Insurance Council, it has gone through significant changes in its title and attributions. In 1982, it was finally established as the Institute of Insurances of Portugal, with a certain degree of autonomy, but still under the tutelage of the Minister of Finance, in 1982.⁴⁶ In 1997 and 2001, new statutes were approved by the center-left executive, increasing its powers and independence.⁴⁷ In 2015, following the organizational changes imposed by the 2013 Framework Law on Regulators, the regulator's statutes were once again amended.⁴⁸ The revision of the statutes lasted almost two years, although FLIRA had determined a period of 90 days. Its new name is now *Autoridade de Supervisão de Seguros e Fundos de Pensões* and it is no longer under the tutelage of the Minister of Finance. ASF holds powers of rulemaking, permission or no opposition, registration or certification of on-site and off-site supervision, enforcement and sanction imposing. ASF is also part of the European System Financial Supervision, namely the European Systemic Risk Board and the European Insurance and Occupational Pensions Authority.

Health Regulator

In early 2000, the health sector in Portugal began operating under a "market logic" open to competition, which resulted in the coexistence of several operators of different nature. In addition to traditional public managed hospitals and health units, the government turned some public hospitals into state-owned companies or granted them more managerial autonomy, contracted infrastructure concessions to private stakeholders in a

⁴⁶ Decree-Law no 301/82, 30th July

⁴⁷ Decree-Law no 251/97, 26th September and Decree-Law no 289/2001, 13th November

⁴⁸ Decree-Law no 1/2015, 6th January

BOT system (build, operate, transfer), signed public-private partnerships and opened the sector to private and third sector operators (António 2015). The private stakeholders of the health sector are not abundant, but they make up to 30% of the global expenses on health (Nunes 2014). Three major groups - Espírito Santo Saúde, José de Mello e HPP Saúde – own almost 12% of the market, which has raised the question of whether they constitute an oligopoly (António 2015). The same has been suggested to exist in the health insurance market by ERS itself, with the two major companies making up over 50% of the market (ERS 2015: 36). In 2010, the turnover of the health sector was over 26, 19 billion Euros.⁴⁹

The health regulator – *Entidade Reguladora da Saúde* - was created in late 2003, by the center-right government coalition PSD-CDS, following the above-mentioned reform. In 2018, it had three board members, 80 employees and a budget of a little over 8,5 million euros. In fact, ERS was prescribed in the diploma that regulated those partnerships, in 2002 and 2003,⁵⁰ as the head of state in office imposed its creation as a condition for ratifying the health sector reform (Nunes 2014). Its statutes were revised in 2009, creating an advisory board and redefining its powers and scope of action.⁵¹ In 2014, following the Framework Law on Regulators, new statutes were passed.⁵²

The scope of ERS regulation includes all service providers (public, private and social) and all activities in the health sector.⁵³ It holds a combination of economic and social regulation, through a model which aims to have a “social matrix” (António 2015:7). It operates in coordination with other public administration bodies, some of which with limited regulatory powers, and the general competition regulator.⁵⁴ As the preamble of its first statute explains, the ERS was established to separate the regulatory function of the State from its responsibilities as a service provider and public funder.⁵⁵

⁴⁹ Source: Health Cluster Portugal. Retrieved from <http://healthportugal.com/Quem%20somos/tableau-de-bord> [consulted on 8th August 2015]

⁵⁰ Decree-Law no 185/2002, 20th August and Decree-Law no 60/2003, 1st April

⁵¹ Decree-Law 127/2009, of 27th May

⁵² Decree-Law n° 126/2014, of 22nd August

⁵³ Except those relating to pharmaceuticals (which belongs to Infarmed) and the health professionals (belonging to self-regulation associations such as the Physicians Association (*Ordem dos Médicos*) and the Nurses Association (*Ordem dos Enfermeiros*), for instance).

⁵⁴ Namely the Directorate-General for Health (*Direcção-Geral da Saúde*) and the Inspectorate-General for the Activities in the Health Sector (*Inspecção-Geral das Actividades em Saúde*).

⁵⁵ *Idem*

As mentioned, ERS's early days were somewhat controversial. Despite the regulator's creation in 2003, its internal rules were only approved by the government two years later, which in practice left the regulator inactive during that period.⁵⁶ This led to political tension, with the President of the Republic publicly condemning the government for its inaction and calling for the full implementation of the regulator.⁵⁷

Electricity and Natural Gas Regulator

The electricity sector is comprised of several stages, all supervised by ERSE: production, transportation, distribution, sales, and consumption. The Electricity of Portugal (EDP) was the state-owned monopoly from its nationalization in 1976 until its privatization in 1995-2000. The state, however, kept a golden share of 33% of the stocks until 2011, when it was forced to sell due to the requirements of both the Memorandum of Understanding and the European Commission's competition requirements. According to Jordana et al. (2006: 451), EDP was the major state agency institutional and its privatization led to an expertise vacuum at the ministerial level, which may explain the relevance EDP still holds at the economic and political level. As part of the privatization and liberalization processes, the EDP has been divided into six independent subsidiaries, including REN (*Rede Eléctrica Nacional*), the transmission company, which was also fully privatized in 2014. On what concerns market liberalization, in 1997 the Portuguese government introduced legislation that opened the sector to competition.⁵⁸ Full liberalization only took place in mid-2004 (Jordana et al. 2006: 454), but the market remains dominated by EDP.

The regulation of the natural gas sector was introduced in 2001, following an EU directive.⁵⁹ The gas services are provided almost exclusively by private stakeholders

⁵⁶ Regulation 418/2005, of 15th April

⁵⁷ Sampaio, J. (2004), Discurso na Sessão de Abertura do Colóquio sobre “Reforma e Regulação da Saúde”, Coimbra, 24th September 2004. Retrieved from: <http://jorgesampaio.arquivo.presidencia.pt/pt/noticias/noticias/discursos-1135.html> [consulted on 6 August 2015]

⁵⁸ Council of Ministers Resolution no 68/97, 82/97 and 95/97.

⁵⁹ Decree-Law no 14/2001, of 27th January; EU Directive no 98/30/CE, European Parliament and the Council, 22nd June

through concessions.⁶⁰ Since the majority of the product is imported, it is the storage and distribution that contributes most significantly to the services in the market. The most relevant players in the market are REN, which controls the imports, storage and distribution, and GALP and EDP, which deal with distribution and trade (Rosa 2013: 271). Despite the good position of REN and EDP, GALP is, by far, the economic group that most profits with the gas sector, with revenues that amount to 80% of all profits generated by the market (Rosa 2013: 271).

The energy regulator, ERSE, was legally created in 1995, but only fully established in 1997, by the center-left government.⁶¹ As of 2017, ERSE had three board members, 86 employees and a budget of over 10, 5 million euros. At the time of its creation, it only covered the electricity sector, following the partial privatization of the national electricity company, EDP, and the liberalization of the sector. In 2002, ERSE statutes were amended to accommodate its new supervisory powers over the natural gas sector and the extension of its scope of action to the autonomous regions of Madeira and Azores.⁶² Since then, statutes were amended four times, reflecting changes in European regulation. Until 2007, ERSE did not have sanctionary powers, which raised criticism among experts and stakeholders. One of the critics was the Court of Audits, which in a 2007 report, criticized the insufficient *de facto* independence of ERSE, among other factors due to the inadequacy of its powers, namely the absence of sanctionary powers (Moreno 2008).

Telecommunications and Postal Services Regulator

ANACOM is the telecommunications and postal services regulator, with five board members, 385 staff members and a budget of almost 100 million euros. The creation of an independent regulatory agency in the telecommunications sector was a long and gradual process. It began in 1981 with the passing of the decree-law that established the Portuguese Institute for Communications (ICP). The ICP was expected to provide the role of providing technical support to the government.⁶³ Despite having been considered one

⁶⁰ Preamble, Decree-Law no 97/2002, of 12th April

⁶¹ Decree-Law no 187/95 of 27th July

⁶² Decree-Law no 97/2002, of 12th April

⁶³ Decree-Law n^o 188/81, of 2nd July

of the first telecom agencies in Europe (Jordana et al. 2006: 446), since its statutes were approved as early as 1983, its installing commission was only set up in 1988 and ICP just became operational in the following year (Denicoli dos Santos 2012: 165). According to Confraria (2005:1), this delay was due to the opposition of the state-owned operators that were not willing to concede their influencing role in policy (Confraria 2005: 1). Besides, ICP's role as a regulatory agency was solely expressed in the law in 1997, complying with the requirements of a 1990 EU Directive.⁶⁴ In 1989, following the Telecommunications Act, ICP was granted more autonomy and extended powers. The regulation of postal services followed a similar path, with the ICP first fulfilling an advisory role and later being granted regulatory powers, after the transposition of EU legislation imposing sector liberalization and independent regulation (Confraria 2005: 9). In 2001, the name of the regulator changed to ICP-ANACOM, until 2014 when the acronym ICP was dropped altogether. Currently, the scope of ANACOM's powers encompasses mail distribution, television services, landline, and mobile telephones and the internet.

The privatization of the telecommunications company (PT) was also a gradual process, which began in the mid-1990s. The 1989 Telecommunications Act liberalized the equipment market and value-added services. During the 1990s, the sector went through a simultaneous process of liberalization and privatization, but not without first empowering the state-owned company, which remains until this day the incumbent in the sector. The privatization process lasted until 2000, but the state maintained a golden share that granted it a final word in strategic decisions. This partial state ownership through the golden shares allowed the Portuguese government to maintain control over the company and, for instance, nominate one-third of its board of directors, including the President, perpetuating the links between the incumbent *Portugal Telecom*, the government, and political parties. Currently, the telecommunications sector in Portugal is relatively competitive and made of different sub-sectors. Regarding mobile and landlines, cable television and the internet, there are three major private operators. The public mail distributor (CTT) was only privatized in 2014.

⁶⁴ Law no 91/97, of 1st August; EC Directive 90/388/EEC

Water and Sewage Regulator

The water sector comprises water supply to populations and economic activities, such as commerce and small industries, as well as urban wastewater drainage and treatment. The waste sector covers the collection, treatment, and disposal of municipal waste. Until the 1990s, local governments were responsible for all the water and sewage systems. Then, in 1993, the sector was reformed and now it is organized in three management levels: local, regional and national (Ferreira 2014: 354). At the national level, a state holding called *Águas de Portugal* was established, which also became the main shareholder of the regional systems/companies. Companies in the water distribution and sewage sectors operate similarly. Contrary to other network utilities at this point, the management of the sector is, for the time being, one of natural monopoly but broken down into regional units. In other words, there are multi-municipal systems, in which several local governments have established and manage regional water and sewage companies, in coordination with the state holding. Currently, these services are provided by around 500 operators, State or municipal-owned or through concession to private agents (ERSAR 2015). During the bailout period, there were rumors about the privatization of the water sector, but those alleged plans did not materialize (Bieler and Jordan 2018).

ERSAR is the water and sewage regulator and it has 3 board members, 70 employees and a budget of a little over 8 million euros. Created in 1997 under the acronym of IRAR (*Instituto Regulador de Águas e Resíduos*) and as a result of the possibility of private sector participation in the sector, it held regulatory powers in the public water supply, community wastewater and urban solid waste sectors.⁶⁵ It has gone through two statute amendments, in 2009 and 2014. In 2009, the amendment was a consequence of the reform prescribed by the Central Administration Restructuring Program (PRACE).⁶⁶ It remained a regular body of the public administration, with a certain degree of administrative autonomy, but still under ministerial control. It was only in 2014 that ERSAR acquired the status of an independent body and reinforced its regulatory powers.

⁶⁵ Decree-Law no 230/97, of 30th August, art. 21

⁶⁶ Programa de Reestruturação da Administração Central (PRACE)

Mobility and Transportation Regulator

The transportation sector is particularly large, encompassing all agents involved in the transportation services, including persons, goods and emergency vehicles. Although the sector comprises both public and private companies, many public companies have been privatized, namely the metro services in both Lisbon and Porto. It is divided into three sub-sectors: rails, roads and water transportation and infrastructure. In 2015, the sector comprised 16,000 companies, mostly micro ones. The land transportation is the most relevant one, making up to 98% of the total number of companies, 60% of the business volume and 88% of the manpower (Banco de Portugal 2017).

The railway sector was limited to one state-owned company, until the 1990s. Then in 1997, the company was split into two: one managing the railways – *REFER* – and the other operating the transportation - *Comboios de Portugal, IP*. EU law has influenced the progressive liberalization of the sector, but mostly at the international level and in the separation of different types of regulations. Domestically, the sector's reform did not lead to an actual liberalization and there is one sole private company in a small route (Ferreira 2014: 337).

The regulation of the transportation sector has undergone several institutional changes in the past two decades, leading to the concentration of several transportation-related bodies and services. During the 1990s and 2000s, there was a proliferation of entities related to rail, river, maritime and road transports. Each subsector had its regulatory agency and state-owned companies managing infrastructures. The existing entities enjoyed a large variety of legal status, from DGs incorporated in the public administration to public institutes with a certain degree of autonomy. In 2007, the *Instituto da Mobilidade e dos Transportes Terrestres*, I. P. (IMTT) was established as a result of the Central Administration Restructuring Program (PRACE), replacing and concentrating at once three other bodies: the Directorate-General of Land and River Transportation (DGTTF), the National Institute of Railways (INTF) and the DG Road Traffic.⁶⁷ Despite being part of the indirect public administration, IMTT remained under the tutelage of the Minister

⁶⁷ Decree-Law no 147/2007, 27th April

of Economy. The 2011 Memorandum of Understanding imposed reform measures on regulatory framework and infrastructure of transports to improve the effectiveness and efficiency of the sector, as well as the independence of the dedicated regulators. (European Commission 2011: 24). Among other measures, this resulted in a second phase of fusions of different entities into a single one. The IMTT, the Institute of Road Infrastructure (InIR), the Port and Maritime Transport Institute (IPTM) turned into the *Instituto da Mobilidade e Transportes* (IMT).⁶⁸ In 2014, IMT's statutes were amended according to the framework law for regulators and its denomination changed to *Autoridade da Mobilidade e dos Transportes* (AMT).⁶⁹ AMT is currently responsible for the regulation, promotion, and defense of competition in the maritime and port sectors and mobility in general for land, rivers, and sea transports. As of 2017, AMT had 5 board members, 55 staff members and a budget of 13.940.105 €.

Civil Aviation Regulator

ANAC is the Civil Aviation Regulator, with three board members and, as of 2014, 174 employees and a budget of 41 million euros. A large sector reorganization came in the 1970s, when the rapid development of aviation led the government to principles separate the self-sustainable services, such as airports from the central public administration and to create a Civil Aviation Directorate-General (DG) for with powers meant to ensure effective guidance, regulation, and supervision of the sector's activities (ANAC 2015).⁷⁰ In 1998, *Instituto Nacional de Aviação Civil* (INAC) replaced Civil Aviation DG and became an autonomous entity, but almost ten years later, its statutes were amended as a consequence of PRACE, making it a public institute.⁷¹ INAC aimed at regulating, supervising and rule-making over the civil aviation sector and its related activities. Its attributions can be divided into four core functions: i) regulation and supervision, ii) security and quality, iii) innovation and development and iv) protection of operators and consumers (Costa Gonçalves 2010). Despite being considered an autonomous body, until 2014 it operated under the tutelage of the Minister in charge of the sector. In 2015,

⁶⁸ Decree -Law no 126 -C/2011, 29th December

⁶⁹ Decree-Law no 78/2014, 14th May

⁷⁰ Decree-Law no 242/79, of 25th de July, Decree-Law no 246/79, of 25th July,

⁷¹ Decree-Law no 133/98, of 15th May, Decree-Law no 145/2007, of 27th April

following the requirements of the framework law on regulators, new statutes are approved and INAC becomes ANAC.⁷²

The scope of regulated stakeholders includes the airports and airfields managing companies, the air navigation services (except for meteorology services, airlines and airlines supporting services, among others), in a total of 6329 regulated stakeholders. In total, in 2013, the sector in total was worth 4.827.809.786 Euros (ANAC 2014). In 2012, ANA, the airport management company was privatized. In the following year, the national airline company - TAP Air Portugal – was partly privatized, in a controversial process that went back and forward, depending on the political party in power. The Portuguese Air Navigation – NAV, that guarantees the provision of air traffic services - Air Traffic Control Service, Flight Information Service and Alert Service – remains a state-owned company.

Media Regulator

The Media regulator can be said to be the only regulatory agency fully enshrined in the Constitution of the Portuguese Republic.⁷³ It is also the only regulator under parliamentary oversight and therefore its statutes are created by law and not by (governmental) decree and its board members are appointed by the parliament and not by the government, like the other IRA. Nevertheless, the nature of the regulator and its scope of powers evolved, particularly at every constitutional reform. According to the most recent reading of the Portuguese Constitution, the media regulator has both civic and economic responsibilities, as it is its duty to protect freedom of expression and information rights, but also ensuring the independence and diversification of the media, through the non-concentration of its ownership.⁷⁴ Currently, media regulator has regulatory powers over the press, the radio and the television broadcasting operating media in Portugal, both public and private.

⁷² Decree-Law no 40/2015, of 16th March

⁷³ The Bank of Portugal is also enshrined in the Constitution. However, its regulatory powers are not foreseen in the basic law.

⁷⁴ Constitution of the Portuguese Republic, Seventh Revision 2005 (Official English Version), art. 39^o

In 1977, when the media regulation was enshrined in the Constitution, various councils for the information sector were created under the auspices of the parliament. These councils only had powers over the public media and aimed at ensuring their independence over the government and the public administration. In 1983, after the first constitutional reform, the four councils were merged into one single independent entity, the Council of the Media (*Conselho para a Comunicação Social - CCS*), which maintained its supervisory power restricted to public media or those financed by public funds.⁷⁵ In 1989, following a third constitutional reform, the *Alta Autoridade para a Comunicação Social* (AACS) was created and replaced CSS.⁷⁶ In 2004, another constitutional reform opened the pave to a new institutional design and in the following year, ERC (*Entidade Reguladora da Comunicação Social*) replaced AACS. It was a new body with different powers, which came into place in 2006, a few months after its legal establishment.⁷⁷ According to Minister Santos Silva, responsible for setting-up the ERC, the new entity aimed at distinguishing itself from its predecessor through reinforcement of its powers, scope of action and resources, as well as a smaller and more efficient board (Silva, 2007: 24). The ERC is part of international networks of media regulators, namely the Platform of European Regulatory Authorities (EPRA) and the Mediterranean Regulatory Institutions Network (RIRM). Currently, the ERC has five board members, 63 employees and a budget of almost 10 million euros.

Since the creation of the regulator, the media scene in Portugal has changed significantly. From a small market during the 1970s and 1980s, with just three large press and radio groups and the public broadcasting (RTP), it went through a liberalization period in the 1990s that, despite having created more newspapers, radios and television channels, maintained most of the economic configuration of the market, as the new media still belonged to the same economic interests – the Catholic Church, Impresa and Lusomundo (Rosa 2013: 364). By mid-2010, the most important media groups in Portugal are RTP (the public broadcaster), Impresa, Media Capital, Cofina, Sonaecom and ZON Multimédia (Idem). Its creation was conducted within a “*climate of particular distrust of regulation per se*” (Sousa 2011: 24). There have been proposals recommendations?

⁷⁵ Law n 23/83, 6th September: Regulates the organization and functioning of the Media Council.

⁷⁶ Law no 15/90, 30th June

⁷⁷ Law no 53/2005, 8 November

suggesting its fusion with ANACOM by some cabinet ministers and international creditors under the auspices the 2011 Financial Assistance Programme (Silvares 2015). It is also worth noting that Portugal and Italy are the sole European countries that have established regulatory bodies for the press (Sousa 2011: 49).

Table V.I. Summary of Internal Features of the Portuguese IRAs

Agency	Board Members	STAFF	Budget
Competition <i>(Autoridade da Concorrência)</i>	3	93	9.776.000,00 €
Banking <i>(Banco De Portugal)</i>	6	1755	
Insurance And Pensions Funds <i>(Autoridade de Seguros de Portugal)</i>	3	225	8.000.000,00 €
Securities <i>(Comissão do Mercado de Valores Imobiliários)</i>	5	225	39.964.000,0 0€
Electricity And Gas <i>(Entidade Reguladora Dos Serviços Energéticos)</i>	3	86	10.000.000,0 0€
Telecommunications And Postal <i>(Autoridade Nacional das Comunicações)</i>	5	385	98 366 613,00€
Water And Sewage <i>(Entidade Reguladora dos Serviços de Água e Resíduos)</i>	3	70	8.000.000,00 €
Health <i>(Entidade Reguladora da Saúde)</i>	3	80	8.500.000,00 €
Transportation <i>(Autoridade dos Transportes e Mobilidade)</i>	5	55	13.940.105,0 0€
Civil Aviation <i>(Autoridade Nacional da Aviação Civil)</i>	3	174	41.274.462,1 2€
Media <i>(Entidade Reguladora da Comunicação Social)</i>	5	63	9.790.025,00 €

Source: Latest Annual Reports available at the IRAs websites

5.3. The Legal Status of IRAs: A Work in Progress

In the previous section, we argue that sectorial administrative bodies were not a consequence of the shift towards a Regulatory State in Portugal which took place during the 1990s. Financial supervision bodies date back to the 19th century, the civil aviation agency was created in the late 1920s and the telecommunication agency was set up in the 1980s as an advisory body to the government. There was even a failed predecessor of the competition regulator. However, most entities only enjoyed a limited degree of administrative autonomy, weak supervision powers and were directly controlled by the government of the day and its ministers. The process of agencification of the Portuguese public administration was not kicked off by regulatory reforms, but it was very enhanced by it. It was because the electricity regulator, which enjoyed significant independence in comparison with other agencies, that provisions on the autonomous public bodies were introduced in the 1997 constitutional review. The proliferation of administrative bodies took place – as some posited “with no limits. [as] there were new ones created every month (Freitas do Amaral 1996 as cited by Moreira 2001: 15) – but not with a remarkable delegation of powers, as the regulation scholarship posits.

The question over which was the first independent regulatory agency in Portugal to be created remains open to debate. From a technical point of view, the telecommunications agency was the first of its type in Europe (Jordana, Levi-Faur, and Puig 2006), but the reform that granted it independence would only arrive in 2001. The securities regulator was established in 1991 and, despite being legally subordinated to the Minister of Finance, from the beginning it enjoyed financial and administrative autonomy (Câmara 2009). Yet, some regard the electricity regulator, created in 1997, as the first agency featuring “independence characteristics” (Moreno 2008: 6; Pereira da Silva 2007: 93).

In fact, it was the creation of the electricity regulator that triggered the domestic debate about the legitimacy and the constitutionality of independent agencies. In a country with a Napoleonic administrative tradition, the government’s control over the public administration is set in stone in the constitution and the existence of bodies at arms-length of the executive challenge that principle. Questions related to the separation of powers were also raised, since IRAs concentrated the power of drafting the rules, enforcing them and sanctioning non-compliance. The classical problem of the democratic legitimacy and

accountability of IRAs was also debated. Most problems were addressed by the 1997 constitutional review, which became a turning point in the legal framework of IRAs in Portugal. By enshrining the right of lawmakers to establish independent administrative entities⁷⁸, members of parliament solved the constitutional problem of the power delegation. The Constitution underlined that the creation of IRAs should only take place for extraordinary purposes, but the door was opened to the proliferation of independent and autonomous bodies in various economic sectors. Figure 1 shows a peak in the creation of regulatory agencies after 1997.

From then on, IRAs were considered special administrative bodies within the more general category of public institutions or simply did not belong to any particular category (Moreira and Maçãs 2003: 203). In 2000, admitting the “exponential growth of the institutional and human universe of the administrations” to which was “not always been possible to instill coherence in the policy and measures adopted in this respect”⁷⁹ the government set up a working group for the study of autonomous and indirect public administration. The working group found a total of 330 *public institutes* in Portugal, marked by casual and heterogeneous solutions and listed five key findings (Moreira 2001):

- Lack of reasoning behind the creation of many institutes;
- Co-existence of different institutional solutions for identical situations, depending on random and circumstantial factors;
- Legal and institutional instability;
- The tendency towards the irreversibility of the institutes, once created;
- The persistence of truly “exotic situations”.

The conclusions were later reinforced by Moreira and Maçãs (2003: 260), who stated that i) there was a lack of homogeneity in the institutional solutions with regards to regulation and that ii) there was a tendency for the establishment of independent agencies, but iii) there were considerable differences between IRAs, even within the same sector, as was the case with financial regulators. Both authors drafted a bill to govern the independent

⁷⁸ Constitution of the Portuguese Republic, art. 267°

⁷⁹ Ordinance no 15324/2000, 11th July

regulators and formally distinguish them from the other public autonomous bodies (Moreira and Maças 2003). The government's resignation and the early elections, that gave way to a new right-wing majority, stopped the process of the creation of a dedicated framework law for the IRAs that would clarify and uniformize their status within the public administration. Yet, that did not prevent the creation of new IRAs on the competition and health sectors. In 2004, the new majority in parliament also approved a framework law for public institutes that would cover all autonomous agencies, with regulatory power or not.⁸⁰ According to the law, public institutes are part of the indirect central and regional public administration (art. 2) and are considered legal persons of public law, endowed with internal organization and their assets, administrative and financial autonomy (art. 4). The framework law stated that some public institutes enjoyed a special regime, the independent regulators being one of them. However, the law did not list the entities that would fit in that category nor defined what the special regime was.

The 2005 legislative elections gave the socialist party its first absolute majority in parliament. From this moment, the issue of regulatory agencies found new momentum. In that same year, PRACE – an ambitious reform the central public administration – was launched. Among several objectives and strategies, PRACE aimed at modernizing and rationalizing structures, improving service quality, harmonizing rules and organizations and reinforcing the normative, regulatory and supervisory role of the state (Bilhim 2006). Moreover, the Court of Audits launched an evaluation round of the IRAs, the first of its kind. Six sectors and their respective agencies were assessed and, besides the sectorial reports, an overall report on regulation was published. The conclusions were in line with previous assessments and were particularly concerning (Moreno 2008):

- Lack of coherence, stability, and predictability in the sectorial legal framework;
- Lack of reform in the laws governing the IRAs, despite the shortcomings, had long been identified;
- Inadequacy in the definition of powers;
- Ambiguities in the statutes of the IRAs and in its place in the ministerial structure.

⁸⁰ Law no 3/2004, 15th January

Simultaneously, scandals and controversies broke out in some sectors. A handful of board members resigned in the electricity and the health agencies, some were transferred to other public bodies in an unexplained manner (Calvete 2012) and a few government decisions were deemed as interference in the markets and the activities of the agencies.⁸¹ The topic gained track in the political agenda and won the attention of parliament. Several bills related to the independence of the regulators and, particularly, the appointment of board members, were presented by the opposition, while the socialist majority did not advance again with its previous bill on a framework law. None of the opposition's bills were successful. However, the momentum was there. In fact, in 2009, some IRAs witnessed a statute reform, namely water and sewage, health and civil aviation. Sometime before, the banking regulator went through a statute amendment and a new media regulator – ERC – was created.

Then, in 2011, the Memorandum of Understanding for the financial assistance forced the government and the parliament to revisit the functioning of the IRAs, especially the independence aspects. Following an independent assessment, as prescribed in the MoU, the government took stock of the previous framework law project. At this point, besides the political parties in parliament and in the executive (it was again a coalition of two right-wing parties), regulated firms and consumers associations, there were new stakeholders involved in the process – the IRAs themselves. Over time, agencies had gained political leverage and made extensive contributions to the bill and, later, to the subsequent statute amendments. In all, the process took over three years – from the drafting of the bill until the last sectorial statute was approved in 2015.

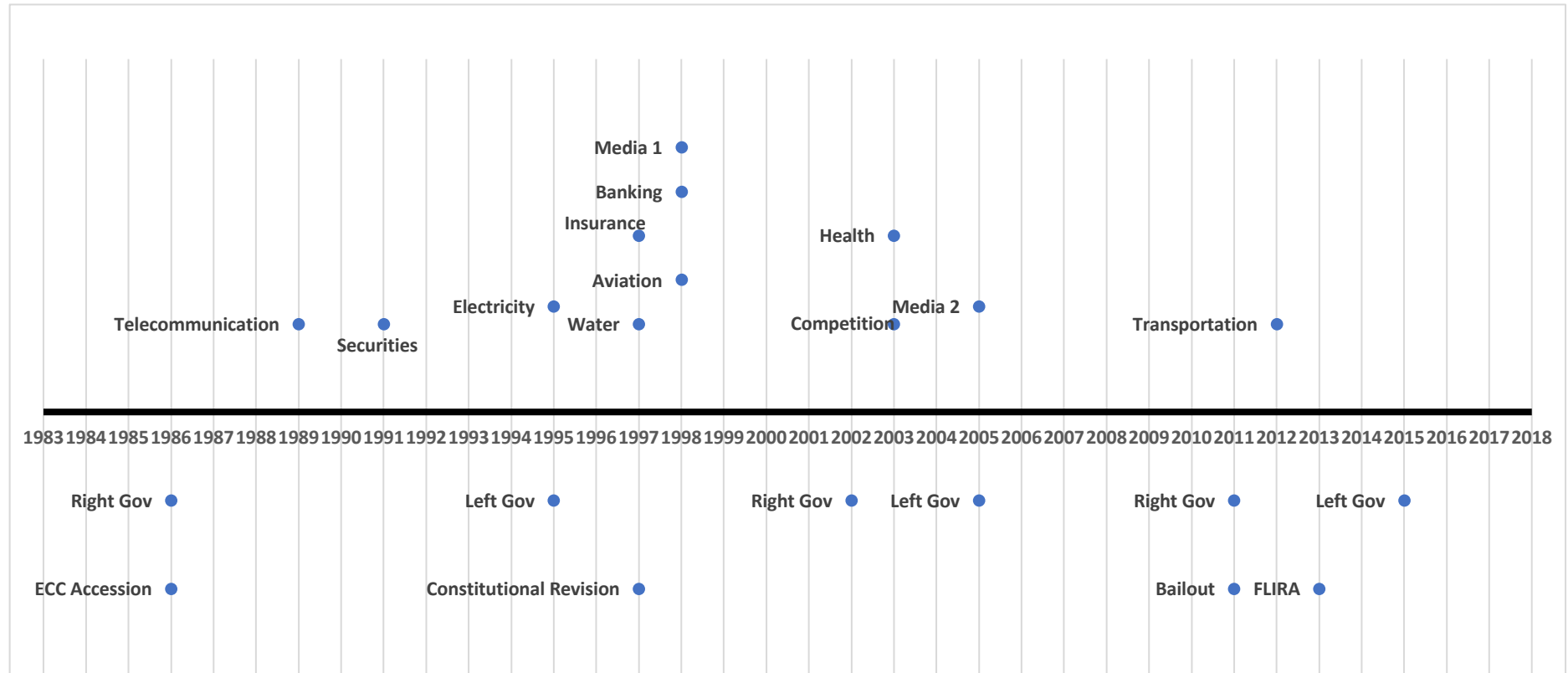
Interestingly though, this major reform of the regulatory institutions was not final, and some new controversies gave rise to political discussions, legal amendments and projects on sectorial reforms. First, the dramatic increase in salaries of some board members prompted the outrage of the left-wing parties that supported the newly installed socialist government. The framework law was amended in 2017 and 2018, accommodating the discomfort created by the salaries and calls for more accountability powers to parliament.⁸² Then, scandals concerning budget freezes, the profile of some appointed

⁸¹ Such episodes are further explored in chapters VII, VIII and IX.

⁸² Law no 12/2017, 2nd of May and Law no 71/2018, 31st of December

board members and the alleged oversight failures in the banking sector led to the renewed political debate about the IRAs, their politicization and inefficacy. Once again new bills were presented, but at the time of the writing of this dissertation, no new rules had come into force.

Figure V.1. Timeline of the Creation of IRAs (above the year line) and Key Events (below the year line)



CHAPTER VI - THE FORMAL INDEPENDENCE OF REGULATORS⁸³

“Institutions are not necessarily or even usually created to be socially efficient; rather they, or at least the formal rules, are created to serve the interests of those with the bargaining power to create new rules.”

Douglas C. North (1994: 360)

6.1. Introduction

We ended the last chapter showing how Portuguese IRAs are frequently reformed and are the object of a political dispute about their independence. We also concluded that, from a historical point of view, most IRAs went through a converging process among them. The process of agencification of the Portuguese public administration and the rise of the Regulatory State crossed paths and evolved to the expansion of a group of independent agencies. The last wave of agencification was the approval of the Framework Law on Regulatory Agencies (FLIRA), which functions as umbrella legislation for the agencies. It was also noted that, before FLIRA, there was significant heterogeneity in the legal statuses of IRAs, from many perspectives. FLIRA, however, did not introduce full homogenization, since it left open the possibility of creating additional provisions for each agency that were better suited to address sectoral specificities. Thus, IRAs still display some degree of variation among them.

⁸³ The expressions “formal”, “legal” and “de jure” independence are used interchangeably throughout the dissertation.

In the present chapter, we focus on the formal independence of IRAs, to investigate to what extent are they protected from the interference of politicians and firms. The law is the first barrier against political or industry capture. The legal independence granted to IRAS is the balance between the demands of economic agents for regulated capitalism and the desire for control on the part of elective or political principals. The outcome depends on the power leverage each side, and the different players within each side have, which in turn depends on numerous factors. Therefore, independence changes significantly across sectors (Gilardi 2002, 2005a, 2008) and countries with different administrative traditions (Thatcher 2005; Bianculli et al. 2013) and varieties of capitalism (Guardianich and Guidi, 2015). Numerous theoretical arguments have attempted to explain this variation, but mostly at the foundation of agencies. This is why, after seminal works on the formal independence of regulatory agencies by Gilardi (2002, 2005a) and Hanretty and Koop (2012), many scholars started focusing on the practice of regulation (Enns-Jedenastik 2014a; Hanretty and Koop 2013; Maggetti 2007). However, over a decade since those earlier works were made, the assessment of the formal independence of IRAs needs revisiting. Institutions change over time, some becoming better shielded from influences (Carpenter 2010) and others less so, as they often end up captured by stakeholders (Martimort, 1999). If lawmakers reform the laws governing agencies, this suggests that *de jure* independence still plays a relevant role as an instrument of control, in addition to interferences in practice. Although principals may or may not make use of control mechanisms, it is the law that defines that possibility and pre-establishes what politicians are allowed to do. Given that politicians' preferences are inconsistent over time and that, despite delegation, they retain the ultimate control over the continuation, termination and the design of agencies, it is expectable that independence changes over time, not only at the *de facto* level but also at the statutory level. In fact, as outlined in the previous chapter, Portuguese IRAs have been through a good number of legal reforms.

In the following sections, we address the following four empirical questions:

1. *To what extent are IRAs formally independent?*
2. *What variation can be observed over time and across sectors?*
What explains variation across time and sectors?
3. *Which IRAs and sectors are more exposed to capture, due to legal provisions?*

In doing so, we measure and analyze the formal independence of IRAs, both diachronically and across sectors; test whether the explanatory variables commonly proposed to be behind the delegation of power at the foundation of agencies still play a role in explaining changes in rules; and looks at how those variables interact with politicians' preferences.

6.2. Explaining Formal Independence

The delegation of powers to IRAs emerged out of the need to insulate regulation from politics and protect markets from time-inconsistent preferences of politicians, ensuring more regulatory and economic stability. Concurrently, they are supposed to secure some sort of public authority over key sectors, to ensure fair competition, access to public interest good and avoid or fix market failures. In practice, this means that agencies are designed to be independent of the industries they regulate and, to a certain extent, from political influence. The first step to ensure this arms-length distance is through legislation that defines various aspects of the agency's status, namely rules governing board members, the financial and organizational autonomy and relationship with government and parliament, but also with the regulatees (Gilardi 2001).

Despite the enthusiasm with which IRAs have been received by scholars of regulation, this institutional arrangement has also been regarded as one of the main challenges to effective party governments (Mair 2008), because it makes it more difficult for politicians to influence the behavior of organizations (Carpenter 2001) and ensure their electoral pledges are fulfilled. The history of independent regulatory agencies is, therefore, one of tension between the demands of the regulatory state for less government interference in markets and the need for politicians to control public administration in order to implement their policies and electoral promises (Blondel and Cotta 1996, 2000; Katz, 1986; Mair 2008; Rose 1969, 1974; Thomassen 1994). The degree of formal independence is the outcome and the balance of that tension. Given that power delegation is not an absolute value but can be materialized in degrees, i.e., politicians may decide to which extent are the agencies they create independent and that may vary due to many variables. Table VI.2 summarizes the empirical studies that have explored those explanatory variables.

Three of the most prominent explanations of the variation of formal independence of IRAs were built without major consideration for party systems and politicians' preferences: coercive isomorphism, emulation and credible commitment. The two other arguments that have advanced to explain variation in legal independence are more related to the preferences of political actors, namely governments and lawmakers, who have power over agencies. In addition, studies on the legal independence focus mainly on the relationship between political principals and the agencies and to what extent do the former give up control over the former. This connection is direct, as lawmakers are the ones responsible for the design of policies and institutions. However, formal independence should also be linked to regulatees. It is up to lawmakers to ensure that IRAs are also at an arms-length from the firms. This is particularly important when markets have been recently liberalized and national champions are state-owned or privatized companies that maintain significant political influence. As Thatcher (2002: 962) explains, "relationships were built on mutual favors – governments protected firms from the competition and in return obtained benefits such as maintenance of employment or money for political parties". Besides, firms lobby governments and parliaments to influence policy decisions. Hence, the willingness of politicians to ensure that agencies are independent of firms should also be considered when measuring and testing formal independence.

Table VI.1. Summary of Empirical Studies on Formal Independence of IRAs

Reference	Method	Cases	Explanatory variables
Gilardi 2002, 2005a, 2008)	Quantitative	Large N Case Cross-sector Cross-national	<u>The credibility of policy commitments</u> : the need to attract investment in a sector, makes IRAs more independent. Utilities, which need more investment than other sectors, tend therefore to be more independent. <u>Political uncertainty</u> : more politically unstable countries display more independent IRA, to ensure policy stability. <u>Veto players</u> : more veto players result in less independent IRAs because policy change is less likely.
Thatcher (2007)	Qualitative	Small N cases Cross-sector Cross-national	<u>Influence of the European Union</u> : independence increases across countries as they converge to the liberal market regulation.
(Hanretty and Koop 2012)	Quantitative	Large N Case Cross-sector Cross-national	<u>Replacement risk</u> (political uncertainty) has a more modest effect in comparison with Gilardi's model. <u>Veto players</u> : the impact is greater than in Gilardi's findings
Bianculli, Fernandez-i-Marín, and Jordana (2013)	Quantitative	Large N Case Cross-sector Cross-national	<u>Administrative Traditions</u> : Napoleonic tradition shows stronger political autonomy

Guidi (2014)	Quantitative	Medium cases One sector Cross-national	N	<i>Varieties of Capitalism (VoCs)</i> : hybrid regimes grant more independence than Liberal Market Economies (LMEs) or Coordinated Market Economies (CMEs) to signal a commitment to competition, as they are less economically efficient than the other two VoCs.
Guardiancich and Guidi (2015)	Quantitative	Medium cases Cross-sector Cross-national	N	<i>Varieties of Capitalism and Labour Market coordination</i> : IRAs in highly centralized CMEs show less independence than in LMEs.

Coercive Isomorphism

The first argument accounting for the level of formal independence of IRAs is *a coercive isomorphism*, conceived as a top-down input through which formal and informal pressures are placed on an organization by other organizations upon which the former are dependent (Dimaggio and Powell 1983:150). Specifically, in the creation of IRAs, national policymakers respond to exogenous (and often common) pressures from various international sources on national political communities (Levi-Faur 2005: 25). Given that the existence of a common legal environment affects the behavior of organizations (Dimaggio and Powell 1983), processes such as Europeanization act as major sources of top-down pressure and subsequently as an explanation for the creation of IRAs (Gilardi 2005b, Thatcher 2007), as several of EU directives impose independent regulators.⁸⁴

Emulation

Emulation is a horizontal diffusion process through which governments conduct some sort of benchmarking of best practices and replicate a model that has been used in other contexts and enjoys a good reputation. In the context of European regulators, Gilardi adds that it is mostly based in two diffusion mechanisms: *taken-for-grantedness*, i.e., "some policies or organizational forms may progressively become taken for granted as the normal solution to a given problem, regardless of their actual effectiveness", and *symbolic imitation* "intended to legitimize the actions of the adopters" (Gilardi 2005b:90). This takes place in environments marked by uncertainty, in which imitation is encouraged (Dimaggio and Powell 1983:151). Diffusion of models may occur across countries that share the same context, such as membership in the same international organizations or economic processes, or within the same country across different sectors. The same thing happens among EU member states that face similar policy challenges and, by the stimulus of European institutions, become models for each other (Raedelli 2000). Empirical studies have shown that when more IRAs are in place, there are higher numbers of changes in new ones being created across countries (Gilardi 2005b). Normative institutional isomorphic change (Dimaggio and Powell 1983) takes place through

⁸⁴ For further explanation, please refer to Gilardi (2005b) who lists several EU directives on electricity and telecommunications.

processes of socialization. The regulators are part of cross-country policy networks. They meet and exchange ideas about institutional formats and regulatory changes necessary to meet new challenges or emerging issues. Socialization leads to similar approaches to common issues and policy conformity.

Credible commitment

A third argument is related to the deficits in the credibility of governments, due to their inconsistent preferences over time. For instance, politicians may change public policies if they perceive that it translates into electoral gains or feel pressure due to public opinion (Gilardi 2002). To increase investor confidence and attract investment, governments have incentives to make credible commitments and insulate policies from their direct control through autonomous bodies. The formal independence of regulators works as a commitment instrument that provides credibility to a policy choice. Sectors that are undergoing liberalization or privatization processes demand stronger commitments, and the establishment of IRAs is more likely when those processes occur, as is the case with utilities or with other economic regulatory bodies (competition and financial markets — Gilardi 2002, 2005b, 2007; Jordana et al. 2011; Levi-Faur 2003). Variations related to varieties of capitalism are also directly linked to this argument. It has been found that mixed market economies tend to produce more independent agencies than liberal and coordinated market economies because the former are less efficient and need to project more commitment to stakeholders (Guidi 2014). The same logic is applied to administrative traditions: in countries with Napoleonic administrations, which are more under the control of the government, politicians are required to signal a stronger commitment to non-interference and thus agencies tend to be more formally independent (Bianculli et al. 2013). The conclusion is that more formal independence is expected in contexts that demand more credible commitment from governments.

Political uncertainty

Political uncertainty results from characteristics of the democratic process itself, as elections may cause policies to change when a new party or coalition gains power (Gilardi 2005a; Hanretty and Koop 2012). This argument is in line with the theory of judicial independence as insurance for political leaders to protect themselves in case they lose

office (Finkel 2005, 2008). Politicians hold authority over policy and have the right to change it without compensations for the losers (Moe 1995). Uncertainty, i.e., the perception or possibility of being replaced in power, may motivate politicians to transfer policy decisions to independent regulators to tie the hands of their opponents, but the propensity to do so depends not only on the chance of immediate re-election of the incumbent government but also on its longer-term prospects, i.e., whether or not there is a perception that the party will stay in office (Figueiredo 2002). In the particular case of IRAs, the likelihood of establishing an independent agency increases when there is a chance that a government will be replaced (Gilardi 2005b).

Management of political control

Although, as seen above, there may be incentives and pressures for politicians to promote the insulation of regulatory bodies from traditional administrations, politicians may still have reasons for wishing to retain some amount of control of IRAs. This is why, despite delegating powers, they have preserved instruments through which they can manage delegated authority (Balla 2011). In fact, no agency can ever be considered fully independent from the political sphere (Enns-Jedenastik 2016b). These control instruments can be, as previously mentioned, the appointment of board members, budget allocation or the redesign of the laws that govern agencies. To be sure, depending on the political system, presidents, governments and parliamentary can at any given time revise the status of an agency, by passing legislation that reverses or increases the independence previously granted (Moe and Caldwell 1994). Yet, de jure independence still builds obstacles that make it more difficult for politicians to interfere in the operation of an agency. The granting of more or less independence also signals the intentions of the principal regarding the agencies.

Veto Players

According to the veto players theory, to change policies an agreement must be reached among different institutional or partisan actors in a political system, i.e., the veto players, which vary in number, distance and internal cohesion influence (Tsebelis 2002). Regulation scholars (such as Levy and Spiller 1994; Spiller 1993) posit that veto players increase stability, as they make it more difficult for policy to be changed. Although with

different degrees of impact, empirical studies have shown that, in line with this view, IRAs are less likely to be created in the presence of many veto players constraining the governments' actions (Gilardi 2005b) and also less formally independent (Gilardi 2005a; Hanretty and Koop 2012).

6.3. Explaining Diachronic and Sectoral Variation in Formal Independence

The above arguments explain two different phenomena. The first is the creation and diffusion of IRAs across sectors and different national contexts. The second is the degree of formal independence. The two are related but cannot necessarily mean the same. IRAs may proliferate, but with low degrees of independence, for instance. For the purpose of the present research, variables such as administrative traditions and varieties of capitalism do not play a significant role, as they are constant in a within case study approach. In addition, as it will be explained further down, from an institutional point a view, the number of veto players may change and should not be disregarded as a hypothesis. Moreover, these empirical studies collected the data at the moment of the foundation of IRAs but have not accounted for subsequent reforms. If these variables play a significant role in the degree of independence granted to IRAs at their foundation, it is expectable that they arise again over time, particularly given the inconsistent preferences of politicians over time and their ultimate power to design agencies. In the following sections, we examine the causes of variation over time and test if those explanations remain valid. If so, it would be expected that:

H1. Coercive Isomorphism Hypothesis

When external pressures are exerted, it is more likely for agencies to be reformed to increase their formal independence. For instance, if new EU directives need to be transposed to national legislation, it is more likely that a reform with an increase in formal independence will take place.

H2. Emulation Hypothesis

Emulation is a process that occurs both across countries (Gilardi 2005b) and within countries (Sugiyama 2011). In the latter case, recent agencies tend to follow the design and pattern of reform of the ones that were successfully established before in a process of domestic emulation. If the pioneer agencies tend to increase independence, other regulatory bodies will follow. Therefore, when older IRAs witness an increase in their formal independence, this is expected to promote waves of reform across similar entities in the same country.

H3. Credible Commitment Hypothesis

Changes in the structure of the market – planned or implemented – require a renewal of the initial credible commitment to potential investors that governments will not interfere in the market as they previously did. Therefore, if the creation of an independent agency signaled that commitment, then the reinforcement of its formal independence through a statute reform is expected each time there is a launch of a new phase of privatization or liberalization of the market.

Concerning politically based explanations, the following two opposing hypotheses were tested:

H4. Political Uncertainty Hypothesis

Political uncertainty may lead to increased independence. Thus, despite the chances of limiting their actions, political parties in power may tend to boost the legal independence of agencies to tie the hands of future governments led by the opposition party in cases where they are uncertain about being able to keep the office in the future.

H5. Management of Political Control Hypothesis

Politicians may manage their power over agencies so that they do not lose control over them entirely. Thus, in the face of the demands of regulatory capitalism, politicians will let go of some control over agencies by granting them independence, but only to a certain extent.

H6. Veto Players Hypothesis

It is expected that within the same political system, the number of veto players remains constant over time and across sectors. However, the creation of IRAs introduces a new institutional actor in the system. The combination of their independence, with the power and reputation they might gain over time (Carpenter 2010), IRAs, functioning as a new veto player, are expected to have an impact on the reform of agencies, as they have also had preferences in regards to their status and independence, which can have an influence on the law-makers decisions.

6.4. Measuring Formal Independence

For measuring formal independence, we used an adapted version of Gilardi's index (Gilardi 2002), more tailored to the Portuguese context, refine the data and permit a more in-depth analysis. The small N cases allow us to refine the level of observation and go deeper into the data sources. The original index draws on earlier works developed to measure central bank independence (Alesina and Summers 1993; Cukierman 1992; Cukierman et al. 1992). It is a composite index divided into five dimensions: (1) status of the head of the agency; (2) the status of the members of the management board (with both dimensions using the same indicators, namely term of office, appointment and dismissal procedure); (3) the relationship with the executive and the legislative branches; (4) financial and organizational autonomy; and (5) regulatory competencies. The index ranges from 0 (no independence) to 1 (full independence) and was obtained by taking the average of the five dimensions.

While maintaining most of Gilardi's index structure and indicators, adaptations were required, particularly for the purpose of better understanding the risks of political and industry capture. There was a need to include more indicators to deepen and refine the analysis, as well as update it with new elements brought up by the literature and the economic context. Gilardi's index was built at the beginning of the 2000s. Since then, particularly in the aftermath of the 2008 financial crisis, new elements related to the independence of regulators emerged, particularly relating to regulated firms. Table 2 lists the indicators and highlights (in the grey shade) the indicators we added, as follows:

Shortly after the beginning of the data collection, it was clear that there were no differences between the status of the head of the agency and the other members of the management board, on what concerned appointment, duration of mandate, dismissal, etc. Separating the two variables would simply duplicate information, without adding relevant value. Therefore, we have decided to merge both dimensions into one – the status of the agency board members.

Gilardi's index focuses mainly on the relationship between the agency and elected politicians. The only indicator that could also be related to the regulated is the independence requirement, but within this context, it may not necessarily be interpreted this way. The revolving doors phenomenon is one of the most relevant of those elements because it might jeopardize the integrity and public trust, and it may offer unfair advantages to certain groups (Miller and Dinan, 2009; Lucca, Seru, and Trebbi, 2014). Therefore, we have included indicators that will allow for the measurement of the legal relationship between the regulator and the stakeholders. We have added indicators that address the relationship with the stakeholder's dimension, due to the risks of capture, namely ex-ante and ex-post employment restriction in the regulated industry, other financial interests in the industry and asset and interest declaration requirements. An indicator addressing the possibility of the staff revolving door was also included in the organizational dimension. Similar indicators were added for ex-ante and ex-post political appointments, given that, as it will be examined, some bills were never passed that made such proposals. Moreover, these are also pertinent indicators for the analysis of the independence of IRAs vis-à-vis political parties and the willingness of governments to impose restrictions on their control over the agencies. A final indicator regarding the institutional independence of the agency was added to the organizational dimension.

Table VI.2. Adapted Gilardi's Formal Independence Index

Indicator	Description	Coding	Weight
<i>Status of the Agency Head</i>			
Term of Office	• over 8 years	1.00	0.05
	• 6 to 8 years	0.80	
	• 5 years	0.60	
	• 4 years	0.40	
	• a fixed term under 4 years or at the discretion of the appointer	0.20	
		0.0	
	• no fixed term		
Who appoints the board members?	•the members of the management board	1.00	0.05
	•a complex mix of the parliament and the government	0.75	
	•the parliament	0.50	
	•the government collectively	0.25	
	•one or two ministers	0.00	
Dismissal	•dismissal is impossible	1.00	0.05
	•dismissal is possible, but only for reasons not related to policy	0.67	
		0.33	
	•there are no specific provisions for dismissal	0.00	
	•dismissal is possible at the appointer's discretion		
May the board members hold other offices in government?	•no	1.00	0.05
	•only with the permission of the government	0.50	
	•yes / no specific provisions	0.00	
Is the appointment renewable?	•no	1.00	0.05
	•yes, once	0.50	
	•yes, more than once	0.00	

Are there any prior office restrictions in relation to political employment?	•Cooling off period of at least 2 years in place	1.00	0.05
	•Less than 2 years cooling off period in place	0.50	
	• <i>No restrictions</i>	0.00	
Are there any post office restrictions in relation to political offices?	•Cooling off period of at least 2 years in place	1.00	0.05
	•Less than 2 years cooling off period in place	0.50	
	• <i>No restrictions</i>	0.00	
Are there any prior office restrictions in relation to regulated firms?	•Cooling off period of at least 2 years in place	1.00	0.05
	•Less than 2 years cooling off period in place	0.50	
	• <i>No restrictions</i>	0.00	
Are there any post office restrictions in relation to regulated firms?	•Cooling off period of at least 2 years in place	1.00	0.05
	•Less than 2 years cooling off period in place	0.50	
	• <i>No restrictions</i>	0.00	
Are there any restrictions for board members to hold any financial interests in regulated firms?	•Yes	1	0.05
	•No	0	
Are board members obliged to present Asset and Conflict of Interest declarations?	•Yes	1	0.05
	•No	0	
Is independence a formal requirement for the appointment?	•yes	1.00	0.05
	•no	0.00	

Relationship with government and parliament

Formal obligations to the government	• there are no formal obligations	1.00	0.05
		0.67	
	• presentation of an annual report for information only	0.33	
	• presentation of an annual report that must be approved	0.00	
	• the agency is fully accountable to the government		
Formal obligations to the parliament	• there are no formal obligations	1.00	0.05
		0.67	
	• presentation of an annual report for information only	0.33	
	• presentation of an annual report that must be approved	0.00	
	• the agency is fully accountable to the parliament		
Overturn of decisions	• no body	1.00	0.05
	• a specialized body	0.67	
	• the government, with qualifications	0.33	
	• the government, unconditionally	0.00	
<i>Financial and organizational autonomy</i>			
Independence formally stated	• yes	1.00	0.05
	• Half independence	0.50	
	• no	0.00	
What is the source of the agency's budget?	• fees levied on the regulated industry	1.00	0.05
	• both the government and fees levied on the regulated industry	0.50	
	• the government	0.00	
How is the budget controlled?	• by the agency	1.00	0.05
		0.67	

	• by the accounting office or court	0.33	
	• by both the agency and the government	0.00	
	• by the government only		
Who decides on the agency's internal organization?	• the agency	1.00	0.05
	• both the agency and the government	0.50	
	• the government	0.00	
Which body is in charge of the agency's personnel policy?	• the agency	1.00	0.05
	• both the agency and the government	0.50	
	• the government	0.00	
Are there any incompatibility rules for staff and outsourcing?	• Yes		0.05
	• No		

One final remark to address the challenges faced at the moment of the scoring attribution on three indicators. The first is related to the "who appoints" indicator. After the approval of FLIRA, the nomination process of board members became more complex. In most cases before FLIRA, a minister or two would suggest an individual that would be collectively approved by the government in the Council of Ministers. With FLIRA in 2013, the nomination process involved two other institutions in two different moments. After the suggestion of an individual by the ministers, the advisory committee for the recruitment of senior public officials (CRESAP), an administrative entity responsible for issuing opinions about public appointments, evaluates the adequacy of the person's profile and issues a report. Then, the parliamentary commission responsible for the respective sector questions the candidate in a public session. Only after these two steps, the Council of Ministers makes the final decision and nominates the person.⁸⁵ In 2017, an amendment to FLIRA created the obligation of the parliamentary commission to draft a "reasoned

⁸⁵ Framework Law on Independent Regulatory Agencies, art. 17, no 3

opinion” about the nominated person, a document that was not previously required.⁸⁶ This complex method raised doubts about which option to choose in the response to the indicator "Who appoints" since Gilardi's index considers two options that could be adequate: a complex mix of the parliament and the government (score 0,75) and the government collectively (score 0,25). We chose to consider the government as the sole responsible for the nomination since legally neither CRESAP or the parliament's statements are binding. The decision was based on two elements: the views of legal experts⁸⁷ on the topic and the practice that followed. It is also worth noting that both candidates to the boards of the Central Bank and the media regulatory, besides not being covered by the framework law, are also not subject to CRESAP's *ex-ante* evaluation.

6.5. Data Collection and Sources

Within the case study, eleven IRAs and their respective 33 statutes that operated changes in the formal independence of IRAs were examined, as listed in Table 6.3. For each IRA, besides the foundational law, only amendments that changed the indicators under analysis were taken into account. Thus, the number of statutes measured for each IRA varies: the energy regulator has four measurements, whereas the competition regulator has two. In addition, for comparability reasons, we measured the framework law on regulators approved in 2013. Hence, for the measurement of formal independence, the different statutes of the IRAs were the primary source of data, which was complemented by other legal documents, namely laws governing autonomous administrative bodies.

For the testing of the politically related hypotheses (H4, H5, and H6), a new set of original documents were analyzed, the bills presented in parliament by political parties and the official opinions presented by stakeholders. So far, all the studies on formal independence just examine the laws in place (Ennsner-Jedenastik 2014a; Gilardi 2002, 2005a; Hanretty and Koop 2012). We believe that to fully understand the process of delegation and the

⁸⁶ Idem

⁸⁷ On 12th November 2013, the Institute for Economic, Financial and Tax Law of the Faculty of Law of the University of Lisbon (IDEFF) organized a conference on “The New Framework Law on Independent Regulatory Agencies - Early Reflections and Prospects for the Future ”. The video recording is available at https://www.ideff.pt/ini_detail.php?zID=23&aID=525 (accessed on the 19th of August 2019).

politics involved in it, it is necessary to go beyond the final documents. It is key to look at all the legal options for the delegation at the disposal of lawmakers and understand why some were elected and others were not. This analysis is done through the bills drafted by political parties in parties in parliament and the official positions of IRAs concerning their status and maps what did and did not make to the final version of the law and why. Therefore, we retrieved from the parliament's website. Regarding the official opinions of IRAs, it was only possible to collect the documents relating to the initial version of FLIRA. This one the only legal document that involved parliament, because all dedicated statutes were decree-laws negotiated, drafted and approved by the government. As parliament has more transparency practices than the government, such as publishing preparatory works, it was possible to extract such documents. This naturally limits the analysis but can be understood as an exploratory exercise. Thus, nine official contributions were examined, one of each IRA covered by FLIRA.

Table VI.3. Statute Amendments of Portuguese IRAs

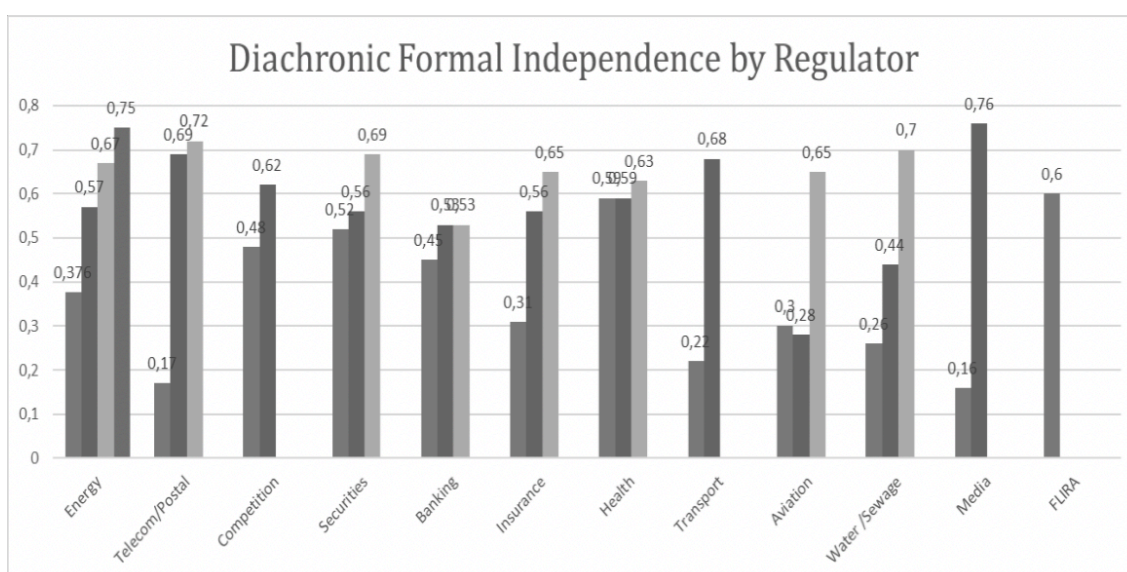
Category	Sector	Year	Legal Diploma
UTILITIES	Telecommunication and Postal Services	1989	Decree-Law no 283/89, 23rd of August
		2001	Decree-Law no 309/2001, 7th of December
		2015	Decree-Law no 39/2015, 16th March
	Electricity and Gas	1995	Decree-Law no 187/95, 27th of July
		2002	Decree-Law no 97/2002, 12th of April
		2012	Decree-Law no 212/2012, 25th of September,
		2013	Decree-Law no 84/2013, 25 th of June
	Water and Sewage	1997	Decree-Law no 230/97, 30th of August
		2009	Decree-Law no 277/2009, 2nd of October
		2014	Law no 10/2014, 6th of March
FINANCE	Land and Maritime Transportation	2012	Decree-Law no 236/2012
		2014	Decree-Law no 78/2014, 14th of May
	Securities	1991	Decree-Law no 142-A/91, 10th of April,
		1999	Decree-Law no 473/99, 8th of November,
		2015	Decree-Law no 5/2015, 8th of January.
	Banking	1998	Law no 5/98, 31st of January

		2007	Decree-Law no 39/2007, 20th of February
		2015	Law no 39/2015, 25th of May
	Insurance and Pensions Fund	1997	Decree-Law no 251/97, 26th of September
		2002	Decree-Law no 195/2002, 25th of September
		2007	Decree-Law no 145/2007, 27th of April
		2015	Decree-Law no 40/2015, 16th of March
OTHERS	Competition	2003	Decree-Law no 10/2003, 18th of January
		2014	Decree-Law no 125/2014, 18th of August
	Health	2003	Decree-Law no 309/2003, 10th December
		2009	Decree-Law no 127/2009, 27th of May
		2014	Decree-Law no 126/2014, 22 nd of August
	Civil Aviation	1998	Decree-Law no 133/98, 15th of May
		2007	Decree-Law no 145/2007, 27th of April
		2015	Decree-Law no 40/2015, 16 th of March
Framework Law on Independent Regulatory Agencies		2013	Law no 67/2013, 28 of August
		2017	Law no 12/2017, 2 nd of May
		2018	Law no 71/2018, 31 st of December

6.6. Analysis and Results

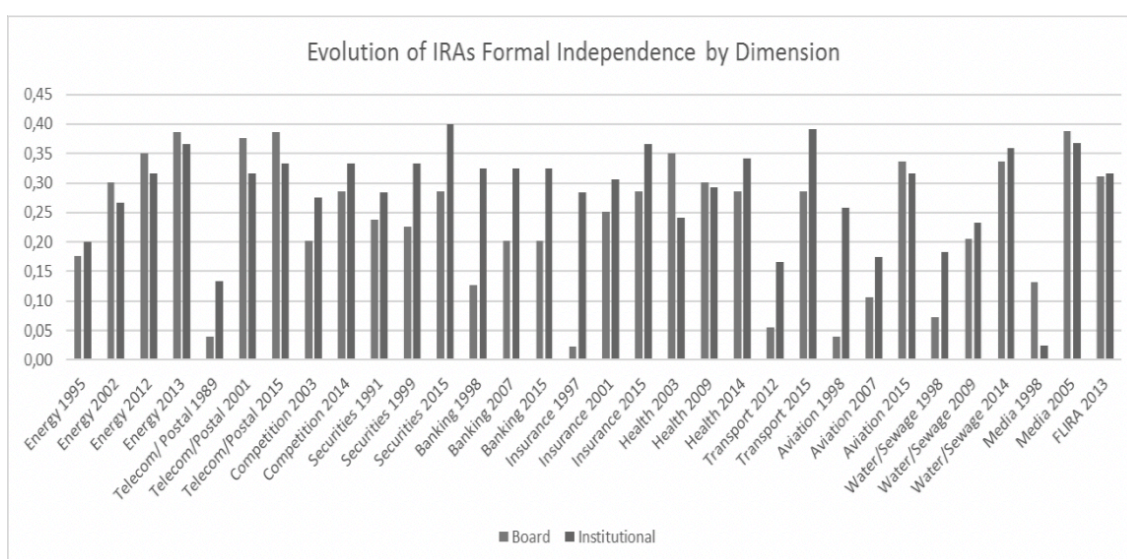
Most regulatory agencies were created with relatively low degrees of formal independence. There was also a manifest and sometimes even dramatic change in the degree of formal independence of all IRAs over time. Figures 2 and 3 show the longitudinal variation among regulators, from which the following conclusions can be drawn:

Figure VI.1. The Diachronic Evolution of Formal Independence by Regulator



With the exceptions of competition, securities and health, all other agencies began with a formal degree of independence below 0.5 points. The lowest value at the time of creation was 0.17 for the communications agency created in 1989 and the highest was the competition regulator created in 2003, with a value of 0.48. The reason for this difference relies on the statutes of the agency at the time of their creation: bodies that were created to be autonomous regulators were more independent than those that were created as part of the public administration and later converted into independent regulators. This is also related to the variation of degrees of independence: former administrative bodies show more dramatic variations of independence. This is particularly evident in the water and sewage regulator and the transport agency.

Figure VI.2. The Evolution of Formal Independence by Board and Institutional Dimension



The framework law on regulatory agencies approved in 2013 had an impact on all statutes approved in the following years and led to convergence across agencies. All IRAs witnessed an increase in their autonomy levels, and that is particularly noticeable in those agencies that were still under full tutelage of ministries, namely in the transportation, aviation, and water/sewage sectors. The least dramatic increases were felt by the energy and the telecommunications/postal agencies, as they were already the most formally independent ones. However, even among agencies covered by the framework law, statutes were not completely harmonized, since – as previously noted – the framework law was not statutory, as it offered room for sector adaptation.

There is an overall evolution of statutes in the direction of granting more independence to agencies, i.e., there is no retraction of formal independence for most IRAs. To a greater or lesser extent, agencies saw their overall formal independence increase over time, with one exception: the aviation agency. The retraction of formal independence took place in the 2007 statute amendment, due to changes in the obligations to the government. While the 1998 statutes determined that annual reports had to be approved by the minister, the 2007 statutes lacked any provisions on those obligations. Yet, parallel legislation on public institutes clarified that ministers are requested to approve several other documents or management acts and are entitled to guide the regulators' activities.

However, when considering the dimensions separately, more subtle retractions are identifiable. Despite the explicit tendency for an increase in overall independence, some regulators experienced retractions in specific indicators, as was the case of the health regulator. Its overall independence between the first and the second statutes was maintained, but there was a retraction in two indicators. The *ex-ante* cooling-off period for board members was decreased in every amendment, only to be fully eliminated in the last reform. There was no apparent reason for this choice. However, during the parliamentary discussion of the framework law, regulators were invited to present opinions and contributions. The health regulator underlined the importance of its *ex-ante* cooling-off rule as an example of best practice and proposed its inclusion in the framework law. Former regulators were not able to explain these changes⁸⁸, which suggests that the redrawing of the mechanism was a strict political choice and not one that emanated from the regulator or that was coordinated with it. Also, the requirement for "independence of the board members" was deleted in the 2014 statutes, whereas it had been present in the two previous statutes. It is also worth noting that, paired with the energy and communications regulators, the health agency was the most independent body since its creation. However, contrary to those other two agencies, it was not established or reformed due to EU membership obligations. Following 2013, the independence requirement for board members was also erased from the reviewed statutes of the securities and the insurance regulators, even though it existed in their previous governing laws.

The relationship between board members, political principals, and regulated firms

The previous remarks call for a more refined analysis of the indicators that are directly related to the relationship between regulators, politicians, and firms. Table 4 shows the existence or absence of mechanisms that help prevent maintain board members a certain distance from political principals and the industry.

⁸⁸ Given the absence of written sources, two former board members of the health regulator were interviewed regarding the elimination of the *ex-ante* cooling-off period, but they were not able to provide any clarification or reveal any rationale for this choice.

Table VI.4. Existence of Statutory Mechanisms that Help Ensure Board Member's Independence

Regulator Statute	Ex-Ante employment restrictions in regulated firms	Ex-Post employment restrictions in regulated firms	Ban on financial interests in regulated firms	Ex-Ante employment restrictions for political positions	Ex-Post employment restrictions for political positions
Electricity/Gas 1997	no	no	yes	no	no
Electricity/Gas 2002	yes	yes	yes	no	no
Electricity/Gas 2012	yes	yes	yes	no	no
Electricity/Gas 2013	yes	yes	yes	no	no
Telecom/Postal 1989	no	no	no	no	no
Telecom/Postal 2001	yes	yes	yes	no	no
Telecom/Postal 201	yes	yes	yes	no	no
Competition 2003	no	yes	no	no	no
Competition 2014	no	yes	yes	no	no
Securities 1991	no	no	yes	no	no
Securities 1999	no	no	yes	no	no
Securities 2015	no	yes	yes	no	no
Banking 1998	no	no	no	no	no
Banking 2007	no	no	no	no	no
Banking 2015	no	no	no	no	no
Insurance 1997	no	no	no	no	no
Insurance 2007	no	no	yes	no	no
Insurance 2015	no	yes	yes	no	no
Health 2003	yes	yes	yes	no	no
Health 2009	No*	yes	yes	no	no
Health 2014	no	yes	yes	no	no
Transportation 2012	no	no	no	no	no
Transportation 2014	no	yes	yes	no	no
Aviation 1998	no	no	no	no	no
Aviation 2007	no	no	no	no	no
Aviation 2015	no	yes	yes	no	no
Water/Sewage 1997	no	no	no	no	no
Water/Sewage 2009	no	no	yes	no	no
Water/Sewage 2014	no	yes	yes	no	no
Media 1989	no	no	no	no	no
Media 2005	yes	yes	yes	no	no

*There is a cooling-off period of one year, which does not meet our pre-determined threshold.

Source: Author's elaboration based on IRAs statutes

The first clear evidence is that there are no provisions aimed at preventing political office holders to be appointed to regulatory agencies or board members to be appointed to political jobs once they leave the office. The absence of such provisions shows that politicians are not willing to self-restraint themselves over such a key mechanism of agency control and party loyalists reward. Bills that proposed restrictions on the appointment of cabinet members at the national, regional or local levels were dismissed in parliament.⁸⁹

The second result is that provisions related to the industry were not foreseen in the early statutes, but over time – particularly after FLIRA – post regulator employment became more strictly regulated. Ex-ante restrictions remain limited to the electricity/gas, media, and telecom/postal agencies, as the provisions of the health regulator were progressively removed. This suggests that agencies are to a certain extent protected from the most traditional capture, i.e., board members have fewer incentives to decide in favor of the industry, as they are banned from taking jobs in the regulated firms for two years. However, little can prevent cultural capture, as former industry experts can freely join most IRAs.

A final finding is the absolute lack of independence provisions imposed on the banking regulator. Board members of the central bank are not subject to any *ex-ante* or *ex-post* restrictions nor banned from having financial interests in the banking sector. In fact, the financial sector is arguably an exception. Historically, financial regulators were the first IRAs and were granted more autonomy than the remaining public administration bodies. The Central Bank and the insurance and pension funds regulators' origins date back to the nineteenth century, but they were only granted special independent statuses in 1998 and 1997, respectively. When comparing independence scores at the time of creation, the securities and the insurance bodies display higher degrees of independence than the energy agency, which was also established in the 1990s. However, the relatively higher autonomy was blurred, particularly following the framework law, which was expected to harmonize the statutes of all regulators. By 2015, when all regulators had their new

⁸⁹ Confirm Appendix A.

statutes approved, the financial regulators were, in comparison, the least independent ones. Indicators that keep independence lower are *ex-ante* cooling-off periods and the lack of an independence requirement for board members. The question emerges as to why this is so. Even before the passing of the framework law by parliament, both the securities and the insurance and pension funds agencies showed strong disagreement on several issues of the bill. From the start, both regulators were against the fact that they were not being treated the same way as their partner financial regulator, the Central Bank (Tavares 2012; ISP 2012). In addition, both claimed the *ex-post* cooling-off periods were not adequate for their profiles and that the Central Bank was not subject to similar restrictions. Despite having failed in their common goal of avoiding *ex-post* quarantines, those regulators are not, as utilities agencies are, subject to *ex-ante* cooling-off periods and their board members are not required to be “independent” individuals. There seems to be a lobbying capacity for financial agencies to ensure that they maintain a revolving door, i.e., they have a voluntary lower level of independence vis-à-vis the regulated sector.

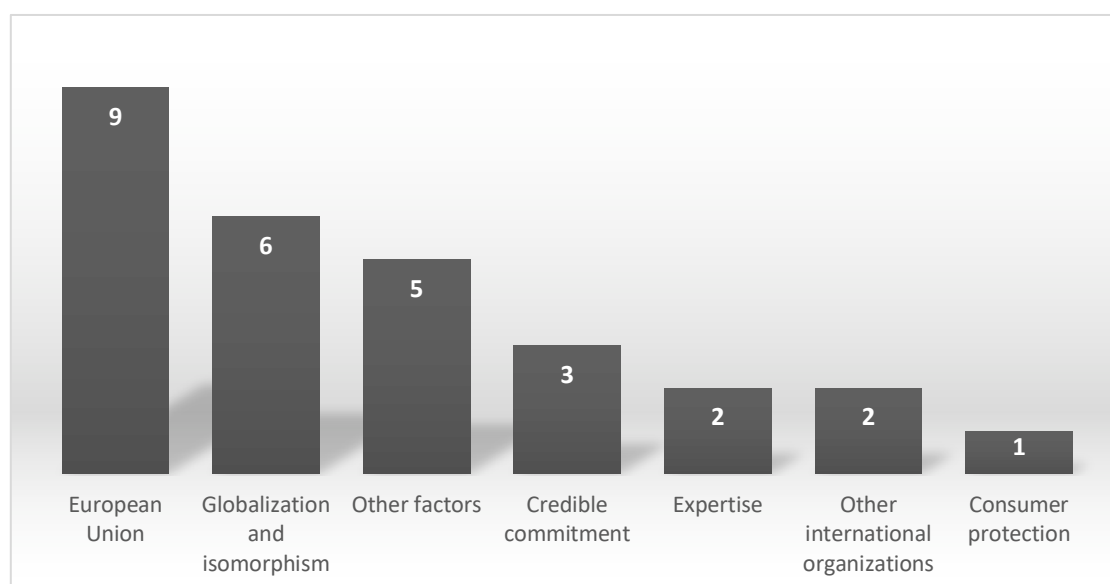
Coercive isomorphism, emulation or credible commitment?

It is now clear that Portuguese agencies have gone through several reforms, which in general led to an increase – although not always a consistent one – of formal independence. The testing of our six hypotheses will be divided into two, according to the source of information. First, the first three hypotheses (H1, H2, and H3), which are related to factors that are external to the political system, are tested. To do so, we look at the official justifications behind those reforms by conducting a content analysis of the preambles of laws and decree-laws related to IRAs. Preambles provide relevant clues for understanding the context, motivations, and stakeholders involved in the design of a law. When deemed necessary, secondary sources, such as media or sectorial literature were consulted. Each hypothesis was linked to one or more expressions that could be found in the preambles of the law, as listed in Table 6.5. Then, we manually counted the presence of these expressions in the statutes and the frequencies are shown in figure 6.5 below.

Table VI.5. Summary of Operationalization of the Non-Political Hypotheses I

HYPOTHESIS	OPERATIONALIZATION	SOURCE OF INFORMATION
H1. Emulation	Globalization Other countries' experiences International organizations	Preambles of the statutes of IRAs
H2. Coercive Isomorphism	Transposition of EU Directives International creditors	
H3. Credible Commitment	Commitment Privatization Liberalization	

Figure VI.3. Formal Justifications for IRA Creation and Reform



Analyzing the context in which IRAs were established and reformed in reference to EU legislation, recommendations and practices appear in the preamble of most laws related to the creation or change of statutes of Portuguese IRAs. Mentions are, for example, “driven by the EU law” or “within the European Union”.⁹⁰ It is not by chance that the two most independent regulators are specifically those that are under stronger influence of EU law: the energy and communications regulators. The EU directives in electricity and

⁹⁰ Decree-law no 309/2001, 7th December; Decree-law no 212/2012, 25th September

telecommunications impose such authorities on member states, regardless of countries' administrative organization or tradition. Besides, the legislative changes of 2013–2015, which followed the international financial assistance program, contribute to the argument for coercive isomorphism and confirm the crucial role of external pressures. The Memorandum of Understanding demanded "the implementation of best practices in terms of independence of national regulators" (European Commission 2011:30) and the Portuguese government agreed to "provide an independent report (by internationally recognized specialists) on the responsibilities, resources and characteristics determining the level of independence of the main [National Regulatory Agencies]" and "present a proposal to implement the best international practices identified to reinforce the independence of regulators where necessary" by the end of 2011 (European Commission 2011: 91). Therefore, H1 is confirmed: the reform of legal status and the increase in independence is mostly driven by coercive isomorphism.

Privatizations and liberalizations (undergoing or planned) surface as the second most common explanation, suggesting that governments need to project credible commitment to ensure the success of those economic policy choices. This was the case for the establishment of the securities, energy and health regulators and for the increase of independence of land transportation, civil aviation, water and sewage agencies (in the case of the latter, it was not privatization but a possible concession of public companies to private investors). Although not as intensely as H1, H3 is also confirmed: credible commitment on the part of politicians towards stakeholders is key in the deepening of *de jure* independence. However, it also shows that, in addition to delegation, credibility is a process that requires periodic renewal and is not a one-off event. Moreover, there is a correlation between H1 and H3. Both EU directives and the Memorandum of Understanding that followed the 2011 financial bailout demanded simultaneous market liberalization and/or the completion of privatizations and the creation or reinforcement of the independence of agencies.

Emulation (H2) shows up in third place, but it plays a stronger role at the domestic level. The 1997 constitutional review that enshrined the possibility of autonomous administrative bodies and the large-scale administrative reform launched in 2006 both had strong impacts on agencies that enjoyed a certain degree of autonomy but could not be fully considered to be independent regulators. This was the case of the creation of the

aviation, the insurance and pension funds and the water and sewage agencies and the statute amendments of those same agencies along with the health regulator between 2007 and 2009. The creation of those three agencies, the restructuring of the communications agency in 2001 following the establishment of the energy regulator and the 1997 constitutional review also suggests a wave of mimetic institutional isomorphism. The energy agency served as a model that was to a certain extent replicated in other sectors.

Political uncertainty, managed political control or veto players?

We now move forward to test the remaining hypothesis, H4, H5, and H6. In spite of the above, there are political partisan dynamics that need to be taken into consideration, as they may signal that governments use delegation as an insurance mechanism vis-à-vis political uncertainty or a way to manage control over time. The summary of the operationalization of these hypotheses is presented in table 6.6.

Table VI.6. Operationalization of the Political Hypothesis

HYPOTHESIS	OPERATIONALIZATION	SOURCE OF INFORMATION
H4. Political Uncertainty	Proposals about independence (based in the indicator of the formal independence index)	Bills presented in parliament by different political parties
H5. Management of Political Control	Acceptance of stronger independence provisions in approved bills	The above-mentioned Statutes and laws
H6. Veto Players	Inclusion in FLIRA of the proposals of the IRAs	

The testing of H4 and H5 should be combined, as the data analyzed is the same and its interpretation is interconnected. The source of information are the bills that were proposed in parliament by different political parties over the years. Over the years, those bills show that the positions of parties regarding independence are different when they

hold power and when they do not.⁹¹ Appendix 4 shows a table with key provisions of each bill regarding the independence of agencies. The bills are organized by the proposing political party, but also show who was in office at each time. Parties are more willing to grant independence when they are in opposition and tend to forgo their previous proposals once in office. Since the early 2000s, parties have proposed bills that address the issue of the independence of regulators. More specifically, in 2000, the Socialist government set up a working group for the study of autonomous administrative bodies and the drafting of a dedicated framework law. At the time, from a functional perspective, the only IRAs were the energy agency, the "special case" of the Central Bank and "to a certain extent" the securities regulator (Oliveira and Moreira, 2001: 19-20). A project for a framework law focusing exclusively on "independent administrative entities" (Moreira and Maças, 2003) was drafted, but only presented by the Socialists when they were no longer in office. The center-right coalition, which was in government and had a parliamentary majority, rejected the bill. However, when in office again between 2005 and 2011, the Socialist Party did not resume its previous bills. Moreover, the 2002 and 2003 bills presented by the Socialists covered the aviation agency, whose formal independence witnessed a retraction in the following years when the party was in power. In 2007 and 2009, both center-right parties presented bills that dictated that the President of the Republic should nominate board members, following a proposal from the executive and a parliamentary hearing. In addition, in 2009 and 2010, other center-right bills proposed *ex-ante* restrictions for individuals who had taken political offices. Both bills were rejected by the Socialists in office. However, when they were in power in 2013, the center-right coalition dismissed their previous proposals when drafting the framework law.

In 2013, when the government proposal for the framework law was being discussed in parliament, the Socialists suggested that the nomination of board members by the council of ministers should be dependent on the positive opinion of the parliament. However, when the same law was reviewed in 2016 and the Socialists were back in power, the nomination process was amended so that parliament would have to issue an unbinding

⁹¹ Bill 346/IX (2002); Bill 178/IX (2003); Bill 344/X (2007); Bill 49/XI (2009); Bill 55/XI/1.^a (2009); Bill 382/XI/1.^a (2010); Bill 595/XIII/2^a (2017); Proposal for changes in FLIRA (2013) in Appendix B.

written opinion about potential board members. The last word on board members remains a prerogative of the government.

To test the Veto Players hypothesis (H6), we analyzed the official contributions and opinions drafted by the regulatory agencies on legal reforms. The only public documents are the ones relating to the legislative proposal presented by the government on FLIRA. These were made available on the parliament's website. As explained in chapter V, before FLIRA, statutes, and amendments were made ad hoc and solely by the government. Contrary to what takes place in the parliament, preparatory work and contributions related to the government's legislative proposals are not made publicly available. This means that the testing of this hypothesis is limited. However, it still offers a piece of relevant information concerning the points of view of IRAs. In those agencies' opinions, we searched for their positions concerning independence vis-à-vis the government and the regulatees.

6.7. Concluding Remarks

The literature on regulation has examined the degree of formal independence at the foundation of agencies and proceeded to study how IRAs function in practice. Nevertheless, statutes are also reformed over time, as this research confirmed, and this should be revisited. Despite having been created to escape policy instability due to principals' inconsistent preferences over time, IRAs are still subject to lawmakers' choices. The position of political parties varies depending on whether they are in office or opposition, with parties being more likely to favor more independence when they are not in power. Incentives to tie the hands of the following government does not seem to be a driver for granting more independence to IRAs. Political uncertainty as an explanatory factor for reforms and independence (H4) has not been confirmed. On the contrary, governments manage the authority they delegate (H5) by legally dismissing policies that grant more autonomy and retaining as much control as they can until they are forced to let go of it by external pressures (H1) and the need to project commitment (H3). Emulation (H2) plays a less significant role. It seems that when H1 and H3 come into play, i.e., when external factors pressure for reform, the easiest solution for lawmakers is to conduct a domestic and international benchmarking exercise and mimic

existing solutions. The veto players' hypothesis (H6), which expected that IRAs gained power and would contribute to the shaping of its only formal independence was not confirmed.

The top-down factors – credible commitment and coercive isomorphism – emerge as the main explanatory variables in the creation of independent regulatory agencies in Portugal, but these also played a key role in various reforms and the increase in the degree of formal independence. While the literature on the diffusion of IRAs had already confirmed this, the findings of this paper suggest that those were not one-off events. Commitment needs to be renewed occasionally (or frequently), as the original power delegation does not seem to be enough. External actors also seem to press for more independence from time to time.

A second finding is that the variation on formal independence is a progressive one, but this also shows that, in each amendment, principals try to retain some degree of control over IRAs and this is the reason why there is always room for more autonomy over time. Moreover, amendments are more a projection of credible commitment for stakeholders and external institutions than concrete willingness to delegate powers to autonomous bodies. As they are the results of external factors over political and administrative systems, IRAs may not be fully accepted and internalized by politicians. Thus, at their initiative, politicians do not show proactiveness in increasing the formal independence of regulators, and when led to do so by external pressures, they only grant enough autonomy to respond to those pressures and provide an appearance of independence. Otherwise, principals would opt for mechanisms that grant most of an agency's independence from the beginning. A third finding is that, despite the diffusion of the regulatory state and its institutions, party politics still play a significant role. The technical nature of IRAs does not prevent them from being the objects of political dispute.

The results suggest two tendencies in the way formal independence of IRAs have evolved: (1) it has increased over the years; and (2) there has been cross-sector convergence. Energy and telecommunications regulators display higher levels of formal independence because these have been the two sectors more exposed to the processes of Europeanization, privatization, and liberalization. Moreover, they have become benchmarks for other sectors, in a process of domestic emulation. Thus, the most important factor influencing the legal independence of agencies were found to be i) the

coercive isomorphism imposed by EU legislation or international creditors, such as the IMF, the ECB or the European Commission; and ii) the credibility required by potential investors when it comes to the stability of regulation. These findings are compatible with the existing literature on the subject (Gilardi 2005b, 2005a). The novelty is the introduction of party politics dynamics into the equation. Despite the pressures (from the EU and external creditors) and functions (such as the need for credible commitments) (Thatcher 2011), law-makers are responsible for the design of IRAs and, therefore, they try to retain a certain degree of control over their creations, while respecting the boundaries imposed by external commitments. Since the issue of independence is a legal and normative issue, lawmakers may assume different positions regarding the independence of these bodies when in office or opposition. While in office, lawmakers take a more instrumental approach to formal independence; when in opposition, they become more critical of government interference and supportive of a hands-off approach. This is what explains that, at every reform, there is an increase in independence: politicians are forced by external pressures or credibility commitments to increase formal independence, but they never go all the way and always retain a certain level of control, which can be slightly decreased in the following reform.

CHAPTER VII – THE DE FACTO INDEPENDENCE OF THE REGULATORS

“Regulatory contracts and institutions have to account for the possibility of a capture of the bureaucracy by interest groups.”
(Estache and Martimort 1999: 2)

7.1. Introduction

In the previous part of this dissertation, we took a look at the creation and evolution of Portuguese IRAs and their institutional design. We concluded that coercive isomorphism and a recurring need to project credible commitment to potential investors were the main drivers for the establishment and reform of IRAs. Credible commitment needs renewal periodically because over time agencies do not seem to live up to the expectations created around them and governments lose the trust of potential stakeholders. Moreover, despite delegating power to IRAs, principals always retain some control over agencies. This explains why there is always the need but also the room to improve the independence of IRAs. In the previous chapter, we dealt specifically with the evolution of the formal independence of IRAs. The institutional design of agencies is the first step to protect them from undesired influence from regulatees and politicians, both expected to stay at an arms-length of regulators.

On what concerns the influence of politicians, we concluded that they were not so keen on tying their own hands. There are no provisions stopping governments from appointing party loyalists or banning regulators from taking up political jobs after office. Moreover, the prerogative rests solely on the government. In terms of budgetary independence, there

is still a debate about the room IRAs have to manage their resources, even if their income is not dependent on government allocation. In brief, lawmakers have shown reluctance in delegating power to IRAs. Holding formal powers over an agency is not necessarily the same as making the actual use of those powers. However, given the reluctance of politicians to give away control over IRAs and the level of discretionary power they maintain over agencies, in this chapter we investigate the independence of agencies in practice. In other words, we measure and analyze to what extent do principals use their power over the agencies.

To do so, the following questions will be answered:

1. *To what extent are IRAs de facto independent from politicians and the regulatees?*
2. *Through which channels is influence exercised*
3. *Is there variation on the intensity of influence between sectors, governments, time or other factors?*
4. *What explains that variation?*

7.2. De Facto Independence: a Theoretical Framework

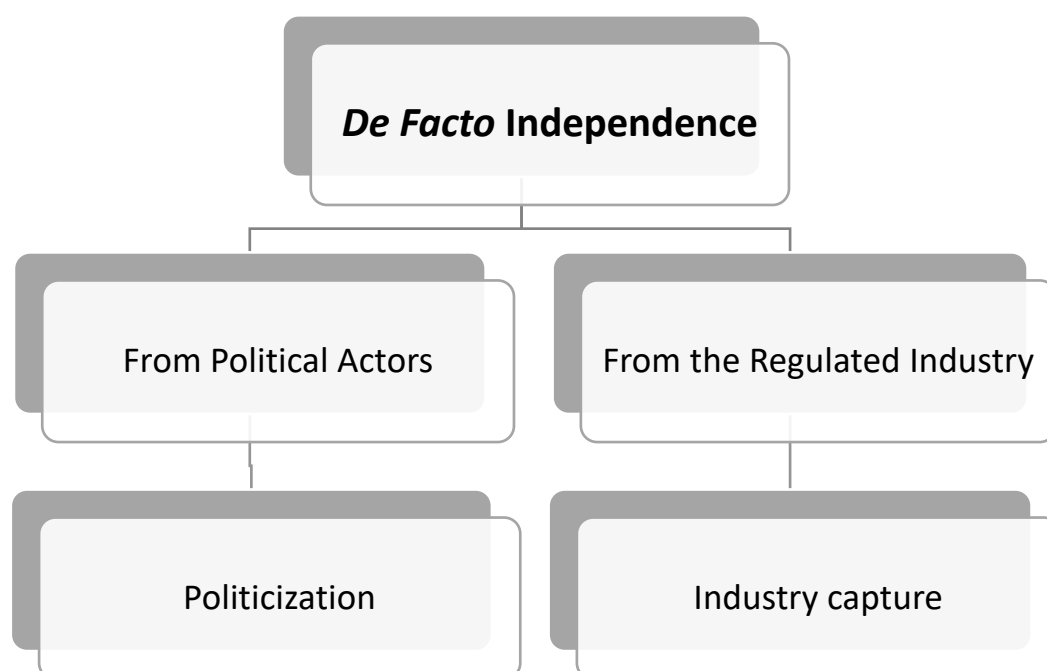
As defined in chapter IV and explored in chapter VI, formal independence is stated in the public law that rules each IRA and is translated in different elements and can be regarded as the first step in the definition of the ability of agencies to conduct their daily activities without political interference, i.e., whether they are legally shielded from that interference. It is an essential first step, as it sets out some boundaries between the political, the regulated industry and the regulatory spheres. Yet, formal independence does not entirely determine the behavior of regulatory agencies and their relationship with those other two actors. As Thatcher explains, ‘powers and controls can be used in many diverse ways and institutional frameworks are incomplete, allowing discretion to decision-makers’ (Thatcher 2002) and, we would add, the influence of the regulatees. Lower formal autonomy does not necessarily translate into low independence in practice, as principals may choose not to make use of the powers they retained over the agency. Practice depends on various factors, namely the reading of the law by stakeholders, the

use or not of the rules prescribed by statutes or practices that are not foreseen in legal texts. In other words, it may be contingent not only on the existence of control mechanisms from the side of principals but also on the actual use of those mechanisms, which cannot be taken for granted (Moe 1985). For instance, governments may retain the right of dismissing board members, but decide not to make use of that power, even if the agency takes a regulatory decision that goes against the views or policy preferences of the executive.

This is why several authors have differentiated *de jure* from *de facto* independence (Christensen and Laegreid 2005, Maggetti 2007, Hanretty and Koop 2013). The distinction is relevant because the relationship between the two forms of independence may not be a direct one. Maggetti (2007: 272): “*De facto* independence characterizes the effective independence of agencies as they manage day-to-day regulatory actions”, which, he adds can be seen as a synthesis of two components – the self-determination of agencies’ preferences, and their autonomy throughout the use of regulatory competencies, that is, during the activity of regulation. This definition encompasses not only the control mechanisms that principals retain – to a greater or lesser extent - over the agency, as referred by Moe (1985), but it is also useful for determining the influence of the industry over the regulators.

The concept of *de facto* independence is, thus, composed of two dimensions: the influence of politicians (political parties, governments and/or parliaments) and the influence of the regulated industry (as a whole or of a given business firm). When the influence of each side results in self-benefits at the expense of the public interest, then the *de facto* independence is low. In such cases, IRAs are facing politicization or industry capture. The breakdown of the concept is shown in figure VII.1 below.

Figure VII.1. Dimensions of the De Facto Independence



De facto independence from politicians

An analysis through the lenses of the principal-agent framework evokes the problem of agency losses when agents do not follow the principals' preferences (Thatcher and Sweet 2002). Governments also good reasons to try to influence the behavior of agencies, after delegation. Executives implement the policies they presented in their electoral manifestos through the bureaucratic apparatus (Blondel and Cotta 1996, 2000; Katz 1986; Mair 2008; Rose 1969, 1974; Thomassen 1994). An effective government is one that is capable to implement public policies demanded by its voters and the channel to do so is through the bureaucracy. In other words, politicians make decisions, bureaucrats merely implement them (Aberbach, Putnam, and Rochman 1981). The failure to deliver has public approval and electoral costs for political parties. This is why, as we have explained in chapter II, in theory, IRAs challenge party politics: not only they do not exist to merely implement political decisions (because in fact they are not supposed to receive political instructions), as they are not placed at the end of the policy process, like the other public administration bodies. They have the power to initiate and participate in regulatory law-making processes and to adopt enforceable regulatory decisions, which might go against the interests and goals of party governments. Despite blame-shifting being one of the

motivations of politicians to delegate power to IRAs, it may also happen that an agencies' decision is controversial or not so popular among voters, namely the rise in prices, and that reflects negatively in support for the party in power. Thus, governments have the motivation to influence IRAs and try to ensure that their preferences are followed and implemented by the regulators. Therefore, besides designing the legal framework in a way that is more favorable to their interests, politicians have at their disposal an alternative (or additional) mechanism to control agencies: via their politicization, i.e. the introduction of political elements in what are generally considered to be insular or apolitical government bureaucracies (Page and Wright 1999; Pollitt and Bouckaert 2011, Aberbach, Putnam, and Rockman 1981; Peters and Pierre 2004, 2; Rouban 2003). When public bodies are politicized, they will tend to benefit governments and/or political parties in office or more easily follow their instructions. In the case of IRAs, regulators may, for instance, interfere in the prices of utilities, maintaining low before elections, for the political gain of governments. Or may decide in favor of state-owned companies that operate in a given market in competition with private-initiative ones. Such cases are particularly concerning, given that IRAs are expected by essence to operate outside the political realm and the umbrella of politicians.

Thus, principals may try to retain as much control as possible and make use of it when needed, while managing external pressures for greater independence. As shown in chapter VI, Portuguese governments still retain appointment prerogatives and have refused to impose a legal ban on the appointment of individuals that are holding or have previously held political offices, like it has been imposed for individuals coming from the industry. While formal independence is key to the performance of IRAs, it is not possible to conclude that it necessarily predicts *de facto* independence. According to Hanretty and Koop (2013: 3), politicians may have good reasons to respect the formal independence of regulatory agencies. In a context where countries respect the rule of law and democratic checks and balances, it is not expectable that politicians do not comply with legal rules defining the formal independence of agencies. Nevertheless, they ultimately hold some power over IRAs, from the possibility of terminating the agency itself to less “radical” instruments, such as the power to appoint board members and exercise some control over the agencies’ budget. That is the reason why Thatcher (2002: 5) posits that ‘elected officials enjoy great discretion and a key issue is how they apply their controls over IRAs’. Hanretty and Koop (2013) add that the practice of the law may depart substantially

from the text of the law, making the latter somewhat unreliable. They further explain that ‘the practice of the law may be more beneficial for agency independence than the text of the law implies. Principals might opt for maintaining the spirit of the law and not use the power they hold, namely not dismissing a board member, even if they can, or only appointing non-partisan individuals.’ The separation of IRAs from the principals’ will is thus considered the ‘political independence of an agency’ (Hanretty and Koop 2013), that is, ‘the degree to which the agency takes day-to-day decisions without the interference of politicians – in terms of the offering of inducements or threats – and/or the of political preferences.’ If an important aspect of independence is the absence of interference from politicians, then the politicization of agencies is the absence of that independence.

De facto independence from the regulated industry

In their daily activities, besides dealing with politicians, particularly governments, regulatory agencies need to interact with the industry rather frequently, to exchange information, conduct consultations, supervise activities and enforce rules. From the side of the regulated firms, pressures and attempts to influence the regulators are expected, as well as some conflicts on the interpretation and implementation of regulations. Firms try to influence regulation in order to obtain benefits, such as de-regulation, prevent the entry of new players in the market, facilitate licenses or even make oversight and rule enforcement less strict. These interactions between IRAs and the regulatees can be formal (public consultations, hearings, periodic reporting) or informal (industry events or informal meetings), meaning that there is a wide range of situations in which firms can exert influence over agencies. Moreover, business interests also maintain contacts and try to influence political institutions and officeholders, given that these are the ultimate decision-makers. According to Levine and Forrence, capture takes place when regulators are motivated by material self-interest (Levine and Forrence, 1990). This self-interest may translate into the prospect of better-paid jobs in the private sector after leaving office, for instance. Firms use a variety of mechanisms and channels to try and capture the decisions of agencies, to obtain beneficial regulatory outcomes.⁹²

⁹² Please refer to chapter II.

7.3. Portugal, a Long-standing Case of Politicization and Industry Capture

The state apparatus in Portugal shows clear signs of politicization in its different branches. The 1982 constitutional revision consolidated the control of the parties over the key institutions, namely the Council of State, the Constitutional Court, the Assembly and the public administration (Lobo 1996:). Public companies suffered from excessive political interference (Baklanoff 1996) and, even after the privatization of some of them, the State enjoyed special rights, namely that the appointment of a board member and her power over the rulings relating to certain matters of national interest.⁹³ The special rights over the former state monopolies in the telecommunications, electricity, gas and oil sectors only ceased after the imposition of the Troika in 2011, as the government was obliged to sell its remaining shares in those companies. Among the companies that remain under public ownership, there has been registered an increase in the number of individuals hired just before elections (Martins 2010: 3).

Some authors have stated that the criteria for the selection of IRAs' board members are the same as for the whole of the Portuguese public administration (Calvete 2012), i.e. "political loyalty or ideological affinity" (Soares 2007: 12). Cases of politicization in different forms are not difficult to find in the media over the past twenty years, some more controversial than others. In 2000, a former junior minister was chosen to preside the securities regulator by the same government in which he had served.⁹⁴ Five years later, when that same party came back to power, he resigned his regulator post to become Finance Minister and chose one of his regulator fellows as his junior minister.⁹⁵ In 2006, the first president of the energy regulator resigned due to a conflict with the executive and was replaced by a former junior minister of the government's party.⁹⁶ In 2015, a

⁹³ Framework Law on Privatizations, Law no 11/90 of 5th April, art. 15.

⁹⁴ Carregueiro (2000), Teixeira dos Santos assume presidência da CMVM, *Jornal de Negócios*, 1st March 2000. Retrieved from : https://www.jornaldenegocios.pt/mercados/detalhe/teixeira_dos_santos_assume_presidencia_da_cmvm (accessed on 20th September 2019).

⁹⁵ Idem

⁹⁶ *Negócios* (2006), Governo nomeia Vítor Santos para presidente da ERSE, *Jornal de Negócios*, 28th December 2006. Retrieved from : https://www.jornaldenegocios.pt/empresas/detalhe/governo_nomeia_vitor_santos_para_presidente_da_erse (accessed on 20th September 2019).

minister appointed his chief-of-staff as a board member of the water and sewage regulator.⁹⁷

Nonetheless, Portuguese regulators are not only under the pressure of politicians but also face risks of capture by the regulated industry. These risks – and at times allegations of actual capture – have also been addressed by several authors. It has been suggested that “from a theoretical point of view, Portugal has good conditions to favor the capture of institutions, namely the reduced dimension and homogeneity of the elite, the disorganization and consequent weak expression of the civil society, the lack of accountability (a concept even difficult to be translated into Portuguese)”.⁹⁸ The functioning of regulatory agencies and their independence in particular as mentioned several times throughout the 2011 Memorandum of Understanding. Troika's concern over the independence of regulators is hardly surprising if one bears in mind that bankers have been the most represented professional group in governments, that over two hundred individuals have taken up almost 400 positions in financial institutions before or after holding a government job and that, since the mid-1980s, all heads of the Central Bank had previously worked in the sector (Louçã et al. 2014; Pena 2014).

In fact, claims of capture or direct benefit towards the regulated firms populate the debate over regulation in Portugal.⁹⁹ In the telecommunications sectors, the implementation of the was also under the suspicion of capture by the incumbent firm, Portugal Telecom (PT). According to Denicoli dos Santos (2012), PT was disproportionately benefited during the process. Other accusations have followed concerning the choice of board members directly linked to that same company.¹⁰⁰ In the financial sector, the insurance

⁹⁷ Garcia (2015), Ministro do Ambiente indica ex-chefe de gabinete para entidade reguladora, Público, 14th March 2015. Retrieved from <https://www.publico.pt/2015/03/14/politica/noticia/ministro-do-ambiente-indica-exchefe-de-gabinete-para-entidade-reguladora-1689084> (accessed on 20th September 2019).

⁹⁸ Garoupa (2016), O Estado-Regulador portuguese style, ECO, 1st December 2016. Retrieved from <https://eco.sapo.pt/opiniao/o-estado-regulador-portuguese-style/> (accessed on 20th September 2019). Our Translation

⁹⁹ Garoupa (2016), O Estado-Regulador portuguese style, ECO, 1st December 2016. Retrieved from <https://eco.sapo.pt/opiniao/o-estado-regulador-portuguese-style/> (accessed on 20th September 2019). Alves (2016), Centros de destruição nacional, Observador, 26th March 2016. Retrieved from <https://observador.pt/opiniao/centros-destruicao-nacional/> (accessed on 20th September 2019).

¹⁰⁰ Garoupa (2017), O fim da ANACOM, DN, 25th July 2017. Retrieved from: <https://www.dn.pt/opiniao/opiniao-dn/nuno-garoupa/interior/o-fim-da-ANACOM-8660405.html> (accessed on 20th September 2019); Aguiar-Conraria (2017), Coutadas e conflitos de interesse, Observador, 2nd August 2017. Retrieved from <https://observador.pt/opiniao/coutadas-e-conflitos-de-interesse/> (accessed on 20th September 2019).

and pensions fund regulator has been accused of benefiting the sector and the regulated firms as a whole (Calvete, 2012: 98). Other signs of cozy relationships between regulators and regulatees have also been publicly known. Concerns over conflicts of interests were raised when the head of the insurance and pensions fund regulator traveled to China to attend a conference organized by one of its regulated firms.¹⁰¹ In 2015, two board members of the civil aviation agency had links to companies that were under their sphere of regulation.¹⁰²

Two years later, in 2017, two names were dropped by the Portuguese government for the postal and telecommunications agency after a negative opinion over the appointments issued by parliament. The majority of the members of the parliamentary committee that analyzed the appointments concluded that the two individuals had links to the incumbent telecommunications company, which could jeopardize the independence of the regulator.¹⁰³ The decision followed an outcry of rival companies, sector specialists and opinion-makers. This was a first. Similar appointments had been made for the banking regulator without any consequences, despite similar public controversy. In fact, in Portugal and abroad, the flow of individuals between politics, regulators and the financial sector has been acknowledged for a long time (Louçã et al. 2014; OECD 2009; Transparency International 2011). This well-known revolving door has even been pointed out as one of the causes of the 2008 financial crisis (Rex, 2013; Ignatowski, Werger and Korte, 2015).

However, all these anecdotal examples are not sufficient to demonstrate the overall politicization or capture of Portuguese IRAs. We need criteria, indicators, and systematic analysis to conclude whether these claims and anecdotes are meaningful.

¹⁰¹ Vicente (2015), Regulador tira férias para ir a Xangai a evento da Fosun, Expresso, 28th June 2015. Retrieved from <https://expresso.pt/economia/2015-06-28-Regulador-tira-ferias-para-ir-a-Xangai-a-evento-da-Fosun--#gs.wkEYkN4> (accessed on 20th September 2019)

¹⁰² Suspiro (2015), Governo ignora reservas do PS e nomeia presidente do regulador da aviação, Observador, 23rd July 2015. Retrieved from: <https://observador.pt/2015/07/23/governo-ignora-reservas-do-ps-e-nomeia-presidente-do-regulador-da-aviacao/> (accessed on 20th September 2019).

¹⁰³ Ribeiro (2017), Parlamento chumba nomes de membros para a ANACOM, Jornal de Negócios, 27th July 2017. Retrieved from <https://www.jornaldenegocios.pt/empresas/telecomunicacoes/detalhe/parlamento-chumba-nomes-de-membros-para-a-ANACOM> (accessed on 20th September 2019).

7.4. Identifying Politicization

The interference of politicians in the activities of agencies is identifiable in three different moments. The first one is during the process of appointment of board members. At this stage, governments can make choices that might guarantee that IRAs will pursue the government's goals. The second opportunity for interference takes place in the daily functioning of the agencies and is identifiable through two indicators – the departure of board members before the end of their term and interference in the budget and financial management of the agencies. Finally, signs that suggest the agency might have been captured by political interests can be found through the career choices of board members after leaving office. The following paragraphs further explain these different levels and the channels that facilitate the identification of political interference. Table 7.1 summaries those levels, channels of influence and the indicators that will be used to measure the de facto politicization of agencies in chapter XIII.

Table VII.1. Summary of Levels, Channels of Influence and Indicators of Politicization of IRAs

Levels	Channels of Influence	Indicators
Input	Appointment of Board Members	Individuals with prior political experience Individuals with experience in politically appointed offices in the public administration
Throughput	Pressure over Board Members	Early Departures
	Financial Management of the Agencies	Spending Freezes imposed by the government
Output	Promises of future political appointments	Individuals that take up political offices after the end of their mandate Individuals that take up politically appointed jobs after the end of their mandate

Input Level: Appointment of individuals with political links

The nomination of board members is claimed to be the most visible and effective formal control (Majone 1996: 38; Thatcher 2002; Wood and Waterman 1991). As Moe (1982: 200) exemplifies with the case of North-American agencies, '[f]rom the beginning, the formal design of the commissions has given [the President] the power to appoint

commissioners and thus, in principle, to appoint men and women whose regulatory philosophies are generally consistent with his own. This is a fundamental mechanism of presidential influence.' Patronage, as the power of a party to appoint people to positions in public and semi-public life (Kopecký and Scherlis 2008), is one way of politicization of public bodies. The concept has defined by Greenfield, relates to the hierarchical relationship between patrons and clients – with the former providing benefits in exchange for the latter's support and loyalty. In politics, the patron is the political party (Shefter 1994) and the appointment of jobs one of the most frequent and relevant of those benefits (Muller 2006b: 190). Patronage may have four main objectives, which are not mutually exclusive:

- The exchange for political allegiance and electoral support, in what Lyrantzis (1984) defines bureaucratic clientelism as a form of patronage.
- The reward of loyal party officials or individuals with personal links with the appointer with jobs or titles (Jalali et al. 2012).
- Influence over policy design and policy implementation, which reduces agency loss (Andeweg 2000; Meyer-Sahling 2006b).
- Institutional control or institution exploitation that operates to the benefit of the party organization (Muller 2006b; Kopeckny et al. 2012).

It has been claimed that in modern European politics, patronage as a means of gaining electoral support has been losing relevance, as parties pay more attention to the use of party appointments to control the policymaking process (Kopecký and Scherlis 2008). As agencification and the legal independence of regulators increase, patronage as an instrument of institutional and policy control tends to become also increasingly relevant. Research on the public sector strongly backs the notion that governments use their appointment powers to promote co-partisans (Meyer-Sahling 2006; Lewis 2008; Boyne et al. 2010; Ennser-Jedenastik 2013).

Patronage in IRAs is more complex than in regular public administration as formal mechanisms to ensure independence limit the discretion of principals over agencies. For instance, in cases where board members are not removable from office, politicians must wait for the end of their mandate (or promote a “voluntary” resignation). In such situations, the measurement of the political vulnerability of board members becomes less

pertinent. The same for the turnover of board members in cases where the law sets one-term mandates or term limits to mandates. Hence, the profile of board members, when the opportunity to appoint them arises, becomes increasingly significant.

Authors have been particularly concerned about the politicization of agencies and the link with the degree of formal independence. Enns-Jedenastik (2015b) also found that individuals with ties to a government party are much more likely to be appointed as formal agency independence increases, but also that in agencies with higher *de jure* independence, board members with political connections to parties of the opposition are more protected, whereas such party ties are likely to reduce the chances of permanence in office for individuals in office in low-independence agencies (2015a). Since politicians cannot directly control agencies due to legal mechanisms, they appoint party loyalists to hold some *de facto* power and in certain cases dismiss opposition members. Fernandez-i-Marín and associates (2015) have also confirmed the high proportion of regulators with political ties in Spanish agencies.

Throughput level: Early departures, spending freezes, and court appeals

Following the logic of politicization, the dismissal of board members is particularly salient during a change in government or a cabinet reshuffle. The direct availability of these instruments depends on the legal design of agencies, as analyzed in the chapter on formal independence. Dismissals for policy reasons are sometimes prevented by law, as well as term renewals. Politicians may find, however, ways to overcome the barriers imposed by statutes.

When regulators do not complete their term of office, two situations may have occurred: either the individual has been dismissed or it has decided to leave the position voluntarily. In many cases, legal statutes do not allow regulators to be dismissed for policy reasons. However, as Thatcher suggests, it is difficult to distinguish ‘forced’ resignations from voluntary ones, which made him count all early departures in his study about the influence of politicians in the IRAs of the four largest European economies (Thatcher 2002: 5). In the North American context, Moe (1982:200) had found similar practices, as “commission chairmen have tended to resign from their commissions (not simply from

the chairmanship) upon losing presidential support, bolstering the president's effective power of removal." As Hanretty further explains:

'If, following a new government, there is a change in the chief executive, then either the chief executive reached the end of her term, or left early. If she reached the end of her term, it may be that the terms of chief executives are designed to coincide with changes in government. [...] If this is the case, then one may assume that the chief executive is, in some sense, the expression of a government choice. If the terms do not coincide with design, then the fact that they did so may create this impression in any case. If, by contrast, the chief executive left early, she was either constrained to resign or did so of her own accord. If she was constrained to resign, this may represent the introduction of some new constraint connected to the government. If she left of her own accord, this may reflect a belief that the government should have a 'clean slate' to influence the forthcoming selection of a chief executive (2010, p. 77).'

Empirical studies on the survival of senior staff of non-majoritarian entities – central banks, supreme and constitutional courts or regulators – do not distinguish between the reasons for departure and count all early departures (e.g. Fernández-i-marín, Jordana, and Bianculli 2016; Hanretty and Koop 2013; Thatcher 2002). Still, the issue of departures before the end of office term is yet to be fully investigated. Thatcher's study on the independence of over 20 IRAs of the four largest European economies during the 1990s, did not find any formal dismissals (Thatcher 2002: 960). He also considered resignations to be relatively rare, despite having found that 29% of regulators in Britain and 18% in France had left their offices earlier (Thatcher 2002: 961). The study, however, may need some updating, since observations were carried out before the peak of the creation of IRAs in the 2000s and did not take into the evolution agencies may have gone through since then. Inspired by the literature on central banks, Hanretty and Koop (2013) developed a proxy of the political vulnerability of regulators, which is the percentage of government changes followed within six months by a change in the agency chief executive. By analyzing 87 regulatory agencies, they found that high formal independence reduces both the vulnerability of agency heads to government change and their overall turnover rate. In a wider and more systematic study of CEOs of European

regulators, Ennser-Jedenastik (2016b) examines the impact of agency independence and party affiliation as well as the interaction between these two factors on the survival of agency heads. The author demonstrated that higher levels of de jure independence protect agency executives with political connections to parties of the opposition, whereas such party ties are likely to reduce the chances of survival in office for executives in low-independence agencies.

Interference in the financial management of IRAs can also be a channel of influence exercised by a government. The financial and managerial independence of agencies is key for the prosecution of their goals. The OECD has underlined the importance of that aspect of the independence of IRAs and has called attention to the fact that it can be easier to influence a regulator by reducing the resources at its disposal (OECD 2017). This reasoning justifies the introduction of indicators of financial and managerial autonomy in the formal independence index built by Gilardi (2002, 2005a) and adapted by us in chapter VI. On the contrary, if agencies do not enjoy a full and clear control over their budget management, they can become "pressure instruments"¹⁰⁴ in the hand of governments (Saraiva 2013: 140) OECD's comments are based on the assumption that such influence can take place in cases in which the regulator is funded through general government revenues.

In the case of Portugal, the regulators are financed by the levies collected from the regulatees or by the contribution of other regulators, as in the case of the competition agency. However, and despite expert views claiming the illegitimacy of such decision (Ricardo 2018), the Portuguese government has imposed spending freezes on agencies or have not authorized the recruitment of staff, which might have an impact in the regulators' ability to pursue their goals.

Finally, we analyze the quantity of appeals regulatees have filed in court against the decisions of IRAs. This indicator takes stock of two previous empirical works – Gonçalves et al. (2010) and Thatcher (2002). Thatcher (2002: 963). explained that "the number of legal challenges to the decisions of IRAs offers a sense of whether a sharp

¹⁰⁴ "Instrumentos de pressão" in the Portuguese original

conflict exists between regulatees and IRAs: legal action represents a public and hostile challenge to an IRA and hence suggests that the IRA has not been captured". Gonçalves and associates (2010: 7) add that the appeals offer an indication of how do the "regulated" ("new managed" category) stand before the powerful regulators.

Output level: the after-office employment

Scholarship on party politics and regulation has limited the analysis of politicization (or lack of de facto independence) by looking mostly at appointments and early departures, as outlined above. In other words, political "capture" of board members has been measured before the office – by appointing party loyalists – or during office – through dismissal or turnover rates. The after-office career of regulators has been mainly studied by economics and capture literature in relation to the influence of regulated interests on regulators. It has been suggested that in revolving doors situations, more than the previous job of a regulator, it is the prospect of future jobs in the industry that predicts capture (Makkai and Braithwaite 1992). The same assumptions could be made to the relationship with politicians and the *ex-ante* or *ex-post* political career of regulators. Even if mandates are longer and non-renewable, top executives of IRAs may be inclined to favor their principals with the expectation of being nominated to other public offices, once they leave the agency.

7.5. Identifying Regulatory Capture

The influence of the regulatees over IRAs is identifiable on two different levels. The first one is during the process of appointment of board members. At this stage, despite being a prerogative of governments, firms can make use of their influence over politicians to push for the appointment of individuals with links to the industry. As we have seen in chapter II, individuals with such profiles have been culturally captured (Kwak 2014b) or maintain contractual links with their former employer and thus be more likely to work towards its preferences. At the output level, the transition to the industry might also be a sign of capture by the industry. In brief, what will be measured in the present chapter is the revolving door movements of individuals between the regulated office and the

regulated industry. Table VII.2 summarizes those levels, channels of influence and the indicators that are being used to measure de facto capture by the regulatees.

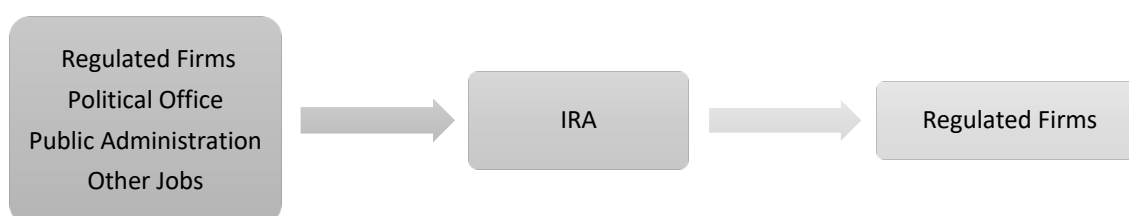
Table.VII.2. Summary of Levels, Channels of Influence and Indicators of Industry Capture

Levels	Channels of Influence	Indicators
Input	Appointment of Board Members	Individuals with prior experience in the industry
Throughput	Pressure over regulatory decisions	Number of IRAs decisions contested by firms
Output	Promises of future jobs in the industry	Individuals that take up jobs in the regulated firms after the end of their mandate

Input and output levels: the story of a revolving door

The career paths of board members of IRAs have been considered as a key indicator of capture or, in a reverse way, of the degree of de facto independence. Board members have a crucial role in the direction of the daily lives of agencies, as they lead the creation of rules, the oversight processes, and the enforcement or not of those rules and sanctions. The concept of revolving doors is quite similar to that of patronage, but it is applied to the interests of the regulated industry, as it refers to the flow of personnel from the regulator to regulated entities and vice versa (figure VII.2).

Figure VII.2. Flows of Revolving Doors



Researchers on capture have divided themselves on the impact of the revolving doors, as an individual that circulates different offices will not necessarily favor the industry. Some claim the circulation of professionals between the private and the public sectors may have positive effects on both sides. For the regulator, it reduces the information asymmetries and improves the quality of the regulator's activities. The expertise of former regulators is valuable to firms. Their inside knowledge may minimize the cost of complying with regulations (Che 1995, Salant 1995). However, revolving doors do increase the risks of undue influence and lack of independence (Koske, I. et al. 2016: 9). As the OECD (2009: 8) explained in a study about the revolving door phenomenon and the 2008 financial crisis, "*[t]his can carry the risk that it increases the likelihood that those making policies are overly sympathetic to the needs particularly of business—either because they come from that world or they plan to move to the private sector after working in government.*" It is the acknowledgment of the risks of *ex-ante* and *ex-post* capture of IRAs that lead to the introduction of cooling-off periods in their statutes (see chapter VI).

The Industry to Regulator Spin

The appointment of board members is a political choice, in most cases. It could thus be argued that businesses have no power over those appointments. However, as we have previously referred to, frequently politicians maintain close relationships with firms, particularly those that were previously state-owned. The influence of the industry, filtered by friendly politicians, can occur. Some authors posit that the professional origin of the regulator may lead to a cognitive or cultural capture, meaning that close relationships with the regulated individuals and common one-sided views regarding the sector may benefit the industry (Carpenter 2014). James Kwak explains that group identification, status, and relationship networks function as mechanisms of cultural capture, in the sense that it there is a set of shared but not explicitly stated understandings about the world that result in the same outcomes as traditional capture, i.e. for the benefit of the regulated interests (Kwak 2014b). To a certain extent, the concept of cultural capture challenges the theory that regulators act based on materialistic self-interest, as it does not necessarily involve a promise or a prospect of future benefits. However, it explains how capture can be done *ex-ante*, i.e. at the moment of appointment of individuals. Empirically, Makkai and Braithwaite have studied this dimension of capture, which they have labeled

“identification with the industry”, and concluded that individuals with prior experience in the sector tend to be less tough on enforcement (Makkai and Braithwaite 1992)

In certain circumstances, however, capture may not simply be cultural, but a direct and materialistic one. If the appointed individual maintains some sort of contractual links or financial interests with her previous employer while in the regulatory office, there are additional risks of that firm being benefited by the agency. For instance, the law allows the appointment for the IRA as a secondment contract, then the links with a regulated firm are maintained.

The Regulator to Industry Spin

The classical view on capture is grounded on the reciprocity of favors, with an explicit or implicit illegal contract between the regulator and the firm. In other words, the firm pays bribes or similar to the regulator in exchange for a beneficial decision or rule. The revolving doors approach of capture is based on the same principles: granting a post-regulatory job in the regulated firm (revolving doors) can function as a mechanism for exchanging favors. The prospect of future employment may never explicit during the regulatory term, nor are the conditions or tasks potentially assigned to the staff. This exchange of favors is hence based on an implicit contract with imperfect enforcement and, as such, it cannot be considered as illegal.

7.6. Explaining *De Facto* Independence from Politicians and Regulatees

Measuring *de facto* independence depends on the perspective of the analysis. Some studies have only focused on the relationship with politicians to measure independence in practice (Enns-Jedenastik 2014a; Hanretty and Koop 2013). Others have only tried to explain the influence of the industry (Katic 2015; Makkai and Braithwaite 1992; Wirsching 2018). And a few have done so by combining both dimensions (Maggetti 2007; Thatcher 2002). The determinants of independence in practice also vary. The old age of agencies seems to make a difference (Smith 1997), but there are conflicting views on how. Some have argued that, over time and due to the quality of its work, a regulatory agency gains reputation, which in turn reinforces its power and thus its independence (Carpenter 2010; Carpenter and Krause 2012). Others posit the contrary: as relationships

between the regulator, the industry and the political power become frequent and closer, the former ends up captured (Olson 1982, Kahn 1998, Martimort 1999). Table 7.3 summarizes the literature on these explanations.

Formal Independence

As explained in chapter VI, the statutes of IRAs and the provisions they contain in terms of independence of the agencies are a reflection of the willingness of principals to delegate power and shield the regulators from the undue influence of the regulated industry. It was also concluded that, even after consecutive reforms, politicians still retain many controls over agencies and that barriers to the capture by the regulatees vary. The degree of formal independence emerges as the most immediate explanation for the de facto independence of agencies. Nevertheless, literature has warned that legal provisions should explain only partially the variations in de facto independence from politicians (Stern 1997; Thatcher 2002a,b,c; Wilks and Bartle 2002). Its impact on the ability of agencies to conduct their daily activities without external interference has been explored by a significant number of authors.

One of the first to investigate such a relationship was Maggetti (2007), who suggested that the relationship between formal and actual independence is not a direct one. Formal independence is neither a necessary nor a sufficient condition for independence in practice, as agencies may operate in a more independent manner than what their legal status would suggest. A high degree of formal independence only explains de facto independence for long-established agencies and in contexts where there is a presence of many veto players. The conclusions were the result of a comparative study of 16 regulators in European countries. His measures comprised indicators for the relationship with both politicians and the regulated industry.

Contrary to Maggetti, Hanretty and Koop (2013) found a strong link between de jure and de facto independence, although working with a methodology that differs from that of Maggetti. After analyzing 87 regulators, the authors concluded that the executive turnover and agency heads' vulnerability to government change is lower in agencies that enjoy higher legal independence. Considering these indicators as measures of de facto

independence, the outcome was that formal independence is a good predictor of the actual one.

Ennsner-Jedenastik also found that individuals with ties to a government party are much more likely to be appointed as formal agency independence increases (Ennsner-Jedenastik 2016b) but also that in agencies with higher de jure independence, board members with political connections to parties of the opposition are more protected, whereas such party ties are likely to reduce the chances of permanence in office for individuals in office in low-independence agencies (Ennsner-Jedenastik 2014a).

The literature shows a gap in the analysis of the connection between legal independence and the influence of the regulated industry and the vulnerability to capture. Except for Maggetti that measures the links between the regulated industry, the other studies focus on the relationship with political parties and governments. Ennsner-Jedenastik warns against the fact that more de facto independence agencies (from politicians) may result in more vulnerability to undue influence by corporate actors, thus increasing the risk of regulatory capture (Ennsner-Jedenastik 2014: 21). However, agencies' statutes include provisions that regulate and try to control the undue influence of the industry. Therefore, the connection should be further explored.

The Old Age of Agencies

As an explanatory variable, "Time" has been treated differently in literature. There are two major streams in this field: the lifecycle argument and the reputation argument. The latter posits that, over time, the regulator builds a reputation that reinforces its power and independence (Carpenter 2010; Carpenter and Krause 2012). Thus, if it occurs, capture is more likely to take place in the early life of the agency.

On the contrary, the life-cycle stream posits that regulatory agencies may go through a lifecycle. First, because they are built under strong public attention, regulators tend to be more zealous and regulatory measures tougher (Bernstein 1955). IRAs start as champions of the public interest, but then gradually become standardized and protecting of the interests of the firms they are supposed to regulate (Kahn 1988). This evolution in the behavior and posture of the IRAs is justified by the increasing influence of interest groups

over time – the building up of collusions that are damaging to the “public interest” (Olson 1982). Over time, regulation loses political and media salience and frequent contacts with businesses open the door to regulatory capture (Martimort 1999). The development of this stream is based primarily on the relationship between the regulated industry and the agencies. Such a restrictive approach has led some to expect that a longer-established older IRA would be more independent de facto from politicians and less independent from the regulatees than will be a younger one (Enns-Jedenastik 2014; Maggetti 2007). That assumption is based on the understanding that politicians and businesses have opposing interests, which may not necessarily be right.

Government’s ideology: a matter of credibility

This explanation delves into the role of government ideology in the institutional dynamics of the rise of the regulatory state. Like other explanations, the conclusions advanced by the literature are inconclusive and not directly related to regulatory agencies in particular or their de facto independence. Yet, some studies offer clues of how the ideology of governments may influence IRAs.

The global diffusion of IRAs across regions, countries’ and sectors suggests that the Regulatory State surpasses ideologies and national political cycles (Gilardi 2005b; Jordana et al. 2011). This is explained by the globalization of neoliberal economic policies, which leads to convergence of practices and institutions and the narrowing of the economic policy differences between the left and the right will diminish (Mishra 1999). The expectation was that it would eventually become increasingly insignificant whether it is the left or the right who wins the election, as the impositions of the globalized economy will force governments to follow the same monetary and fiscal policies, regardless of the ideological positioning (Berger 2000). In fact, empirical evidence that the policies of conservative and left-wing governments have begun to look increasingly alike have been found (Huber and Stephens 2001).

However, one of the reasoning behind the delegation of powers to independent agencies is the need to project credible commitment and show that the inconsistency of preferences of politicians will not affect regulatory policies (Gilardi 2002, 2008; Majone 1994, 1997; Thatcher 2002; Thatcher and Stone Sweet 2002). Certain circumstances may demand an

increased or renewed credible commitment from governments, namely the launch of privatization processes or economic crisis. Hence, the more politicians need to project credibility, the less politicized agencies are. empirical studies (Ennser-Jedenastik 2016a) have found that left-wing governments are more likely to establish utility regulators after liberalization than right-wing governments. The latter supposedly offer greater motivational credibility for pro-market regulation and are in lesser need to show commitment through independent bodies (Gilardi 2008). These results, however, only concern the creation of IRAs and their relationship with politicians.

The Sector: a matter beyond credibility

Previous empirical studies have explained the cross-sectoral variation of formal independence with the credible commitment argument (Gilardi 2002, 2005a, 2008). These studies found out that, in comparison to other sectors, agencies regulating utilities enjoy higher levels of legal autonomy. Such independence is expected to derive from the fact that these sectors have gone through privatization and liberalization processes that demand more commitments from politicians. To project commitment to investors, politicians grant more legal independence to the regulatory agencies. Empirical studies have transposed this link between political control and formal independence to the analysis of the relationship between politicians and agencies in practice (Ennser-Jedenastik 2014a). It was shown that more formally independent agencies are more politicized. If linked with previous studies that showed that utility agencies are the most legally independent, it can only be assumed that they are also the most politicized ones.

However, by focusing only on principals, literature has failed to explain cross-sectorial variation in the relationship with the regulatees and potential situations of capture. For instance, the financial sector has shown its particular features, which the above-mentioned literature has failed to explain. Several studies have found that financial regulators have been subject to industry capture and intense revolving doors between the regulatees and the agencies (see for instance Kwak 2014a; Tyllström 2019). It seems that cross-sectorial variation at the de facto level is yet to be thoroughly explained.

Hypothesis

Not all hypotheses advanced by literature are testable in this research, for methodological reasons and availability of data. Therefore, we selected five hypotheses that are the most adequate for our case study. In the following paragraphs, there is a description of the hypotheses and our expectations and in Table VII.4 the respective summary.

H7. The ideology of the appointing government

This hypothesis is only tested at the input level because it is the moment when governments may play a more relevant role. It is, nevertheless, applied in both dimensions, as governments may appoint individuals that are party-loyalists for their own benefit or appoint individuals that are business-friendly to make a favor to the regulated industry. Therefore:

- i) On what concerns politicization and following the existing literature on the ideological positioning of governments and their credibility challenges, we expect to find less political loyalist appointments by left-wing governments.
- ii) Regarding the industry capture, we would expect to find more industry-related

H8. Formal Independence

As summarized in the previous section, there are no definitive conclusions about the role of the degree of formal independence in the intensity of external influences. In addition, research has only focused on the input level and the politicization dimension. Our adapted formal independence index has provisions regarding the relationship with the regulatees, namely ex-ante and ex-post cooling-off periods. Such provisions have an impact at that level and dimension too. Therefore, we test the present hypothesis in new ways. First, we follow Ennsner-Jedenastik (2016a) views, given that it is the most recent study and with a methodology that is similar to ours, and expect that:

- i) At the input level, politicization is stronger in agencies that display higher levels of formal independence.

- ii) Also at the input level, but given the existence of provisions that shield the influence of the regulated firms, higher levels of formal independence lead to weaker industry capture.
- iii) At the output level and again due to the legal provisions imposing ex-post barriers, higher levels of formal independence lead to weaker industry capture.

H9. The Old Age of the Agency

This hypothesis is tested at the input level on both dimensions. We follow the theory of the lifecycle of agencies, which is mainly focused on the relationship between the regulator and the regulatees, and expect that:

- i) The older the agency, the higher the number of industry-related appointments.

As noted in the previous sections, some posit that the closer agencies are from businesses, the farther away they are from governments (Enns-Jedenastik 2016b). Such a position derives from an early view on regulation that considered governments and businesses as having opposite interests (Majone 1997). Hence the creation of IRAs as a neutral referee in the market. Thus, we can also expect that:

- ii) The older the agency, the lower the number of appointed politicians.

H10. The Sector Typology

Following the findings of various bodies of literature that focus on the nature of markets and industries, we expect that sectors have different effects at the input and the output levels and in both dimensions:

- i) At input level and concerning the politicization dimension, utilities agencies are more likely to have former politicians on the boards.
- ii) Also at the input level, but relating to the industry capture dimension, financial regulators are more likely to have industry-related board members.
- iii) At the output level and concerning the politicization dimension, utility agencies are more likely to see their board members move to political offices.
- iv) Also at the output level, but relating to the industry capture dimension, Financial regulators are more likely to see their board members move to the regulated industry.

H11. The Profile of the Board Member

This hypothesis has not yet been tested by the literature. There are, nevertheless, studies that point out the fact that the profile of the individual has an impact on his behavior and expectations. Makkai and Braithwaite (1992), for instance, have claimed that individuals with previous links to the industry are indeed less likely to benefit the regulatees than those that expect to be rewarded with a job by the firms once they leave the regulator. An opposite view can be drawn by the scholarship on cultural capture, which posits that shared values and beliefs between the regulator and the regulatees may lead the first to act in benefit of the later (Kwak 2014a). Tacking stock of this position, we expect that at the output level and applicable to both dimensions, individuals return to the jobs they had before their appointment to the IRA.

Table.VII.3. Summary of Literature on De Facto Independence

Explanatory Factor	Relationship studied	Conclusions	Reference
Formal Independence	Politicians Regulatees	The relationship between formal and actual independence is not a direct one. Formal independence is neither a necessary nor a sufficient condition for independence in practice.	Magetti (2007)
	Politicians	Formal Independence is a good predictor of de facto independence.	Hanretty and Koop (2013)
	Politicians	Individuals with ties to a government party are much more likely to be appointed as formal agency independence.	Ennsner-Jedenastik (2016a)
Old Age of Agencies	Regulatees	Over time, agencies tend to be less independent from the regulated firms, due to an increase of contacts and lack of public attention.	Bernstein (1955) Olson (1982) Kahn (1998) Martimort
	Regulatees	Over time, agencies tend to gain reputation and thus become more shield against external interference.	Carpenter (2010) Carpenter and Krause (2012)
The Ideology of the Appointing Government	Politicians	With the globalization and convergence of neoliberal economic policies, governments are forced to implement the same policies, regardless of their ideological positioning.	Mishra (1999) Berger (2000) Huber and Stephens (2001)

	Politicians	The creation of IRAs is a credibility issue. Left-wing governments face more credibility challenges vis-à-vis investors. Therefore, they tend to establish more independent agencies to overcome those credibility problems.	Ennser-Jedenastik (2016a)
Sector	Politicians	Utility agencies are the more politicized IRAs.	Ennser-Jedenastik (2016a)
	Regulatees	The financial sector has shown more signs of industry capture.	Kwak (2014a) Tyllström (2019)

Table VII.4. Summary of Hypotheses and Respective Indicators, Levels, Dimensions and Expectations in Relation with the Dependent Variable

Hypotheses	Indicator (data source)	Level	Dimension	Expected relation with the Dependent Variable
H7. The ideology of the appointing government	Nominating political party: whether the government in office is right or left-wing	Input	Politicization	Left-wing governments are less likely to appoint political loyalists
			Industry Capture	Right-wing parties are more likely to appoint industry-linked individuals
H8. Formal Independence	The value of formal independence of the legal statute in force at the date of appointment of the board member (Adapted Formal Independence Index explored in chapter VI)	Input	Politicization	The higher the degree of formal independence, the higher the number of appointed politicians.
			Industry Capture	The higher the degree of formal independence, the lower the number of appointed industry-related individuals
		Output	Industry Capture	The higher the degree of formal independence, the lower the number of individuals that move to the industry
H9. The Old Age of the Agency	Old Age of Agencies: years between the date of creation of the agency and the year of appointment	Input	Politicization	The older the agency, the lower the number of appointed politicians;
			Industry Capture	The older the agency, the higher the number of industry-related appointments.
H10. The Sector Typology	Whether the board member was appointed to one of the major sector typologies (Utilities, Financial or Other)	Input	Politicization	Utility agencies are more likely to have former politicians on the boards.
			Industry Capture	Financial regulators are more likely to have industry-related board members.

		Output	Politicization Industry Capture	Utility agencies are more likely to see their board members move to political offices. Financial regulators are more likely to see their board members move to the regulated industry.
<i>H11. The Profile of the Board Member</i>	The previous job category of the board member before he or she was appointed to the IRA	Output	Politicization Industry Capture	Individuals are expected to return to the jobs they had prior to their appointment to the IRA

CHAPTER VIII - POLITICIZATION AND CAPTURE: AN EMPIRICAL ANALYSIS OF REVOLVING DOORS

“It's time to take the quality of our watchdogs seriously”.

(Frank 2009)

8.1. Introduction

In 2017, two names were dropped by the Portuguese government for the postal and telecommunications agency after a negative opinion over the appointments issued by parliament. The majority of the members of the parliamentary committee that reviewed the appointments concluded that the two individuals had links to the former state-owned and current major telecommunications company, which could jeopardize the independence of the regulator.¹⁰⁵ The decision followed an outcry of rival companies, sector specialists and opinion-makers. Similar appointments had been made for the banking regulator without any consequences, despite similar negative reactions. In the following year, there was another controversial appointment for the electricity and gas regulator. This time it was a member of parliament affiliated with the government. After much public and political criticism, the MP refused the appointment. The end result of these two affairs was unprecedented. It was the first time that the names publicly

¹⁰⁵ Comissão de Economia, Inovação e Obras Públicas (2017), ACTA NÚMERO 122/XIII/ 2.^a SL . Retrieved from <http://app.parlamento.pt/webutils/docs/doc.pdf?path=6148523063446f764c324679626d56304c334e706447567a4c31684a53556c4d5a5763765130394e4c7a5a4452556c5055433942636e463161585a765132397461584e7a5957387651574e3059584d764d734b714a54497755307776515852684a5449774d5449794c5449334c6a41334c6a49774d5463756347526d&fich=Ata+122-27.07.2017.pdf&Inline=true> (accessed on 15th August 2019)

disclosed by the government were refused due to potential conflict of interest. In fact, in Portugal and abroad, the flow of individuals between politics, regulators and the industry has been acknowledged for a long time (Louçã et al. 2014; OECD 2009; Transparency International 2011).

In the previous chapters, we offered a theoretical overview of independence in practice, how it differs from legal provisions and why it is important to investigate it. We also outlined the hypothesis that can help explain it. First, we explored the influences of political parties over the agencies and how these can overcome the legal constraints by politicizing the functioning of IRAs. Second, we used the same logic to understand how regulated firms could capture regulators in practice. In both chapters, we discussed the literature, outlined influence mechanisms and looked for an explanatory factor that could help determine whether an agency was more likely to be politicized or captured by the industry. In this chapter, we move on to the empirical analysis of the data relating to *de facto* independence of agencies and how they are potentially influenced by politicians and regulatees. Following the logic of a process, our dependent variable (*de facto* independence) is measured in three moments (input, throughput and output) for two dimensions: political influence (risk of politicization) and business influence (risk of capture). At the input level, both dimensions are assessed through the appointment of , party-loyalists (to reward party-allegiance/commitment) and individuals from the private sector (which may signal capture filtered by a political choice). At the output level, again the two dimensions are assessed, again via the revolving door practice, closing the circuit.

8.2. Methodological Strategy and Data Overview

For the analysis of the intensity of the revolving doors in Portuguese regulators, we collected publicly available data from board members since the establishment of the agency as a legally independent body. The primary source of information was the appointment orders published in the Official Gazette, which contain a summary of the individual's CV, namely previous professional and political positions. Despite being official, this source of information presents two shortcomings: it is only useful to trace the professional path prior to the regulatory office and does not provide any guarantee

that all the jobs taken by the appointee are listed. Besides, during the 2005-2009 socialist government, most appointment orders were published without the CV. Therefore, information was completed through another primary source of information, the official webpage of the regulators, which also makes available the CV of their current and frequency of the former board members. In order to complete the information on previous jobs, but mostly track the post-regulator career, we resorted to different sources and crossed information to ensure that the data collected was correct. Depending on the career path of the individual, the sources of information used were, once again, the Official Gazette, the online media, professional online networks such as LinkedIn, as well as the institutional websites of the individuals' current jobs, namely companies, international organizations, universities or public bodies. Our database comprises 199 appointments, 151 individuals and 75 variables, in a total of 14,925 observations. Little less of a third of the appointments were correspond to the heads of agencies (28%). The mismatch between the number of appointments and individuals results from two factors: i) turnovers (while the majority of individuals only completed one mandate, some stayed in office for two, three and even four mandates); and ii) some individuals were appointed for more than one IRA or were appointed to the same agency at different points in time, i.e., not consecutively. The same data is used for the measurement of early departures¹⁰⁶, mandate renewals,¹⁰⁷ and after-office careers, but with the exclusion of the individuals that were in office at the time of the writing of the dissertation. For those measurements, only 144 appointments are considered.

8.3. Input level: The Professional Profile of Board Members

As thoroughly explained in the previous chapters, board members are crucial for the performance and steering of IRAs. They are the ones that define the annual plan of activities, as well as the priority of the agencies' work, the type of relationship maintained with political institutions and the regulated firms. Finally, they are the ones responsible for approving regulations and enforcing them. Hence, the appointment of board members is a crucial instrument of potential *ex-ante* influence over agencies. It can be used by

¹⁰⁶ This indicator will be explored in chapter IX.

¹⁰⁷ Idem

political parties and politicians, in general, to influence IRAs that, otherwise and due to legal limitations, are outside their control. Regulated firms can also make use of their leverage over executives in order to persuade them to choose industry-friendly people.

Descriptive Statistics

This section contains descriptive data about the distribution of type of appointments per sector, government and profile of the board members. In order to identify previous links to politics and to the regulated industry, we coded the professional experience of board members according to four categories:

1. Political Office, i.e. whether the individual had had a job in the executive or legislative (at the national, regional or local levels), in the European Parliament or in the main political party structures. Given that, in Portugal, party membership is not publicly disclosed, this kind of information was not considered.

Within this category, the data was further refined to include sub-categories of politically experienced people. There is a variety of types of political offices board members held prior to their job in the regulatory agency. In the database, the following categories were coded:

- a) Government members (ministers and junior ministers);
- b) Cabinet advisors (i.e., special and technical advisors to minister and junior ministers);
- c) Members of Parliament;
- d) Others, a category in which might fall positions such as party officials or local government offices.

Some individuals have taken more than one political office in different periods of their lives. In such cases, only the last position before the appointment to the IRA was coded.

2. Politically appointed offices in public bodies, such as central administration, state-owned companies or other autonomous bodies, namely other regulators. Given that the distribution of jobs is a crucial element of patronage, as well as an instrument of reward and maintenance of loyalty links for political and electoral

gains, these offices in public bodies, are of key importance. It has been suggested, for instance, that the two major parties in Portugal have “luxury reserves”¹⁰⁸, i.e., party loyalists who are always appointed by the same party to senior positions in the public administration (Silva 2013: 328).

3. Jobs in the regulated industry. While, in the majority of cases, the direct link between the industry and the regulator (i.e., the electricity company and the energy agency) was counted for, in the case of the financial sector, we considered any experience in financial companies as relevant for any of the sectoral agencies. For instance, prior experience in the banking sector was coded as a job in the industry when the individual was appointed to the insurance and pension funds. The reason for this choice is the nature of the industry itself, as financial groups operate and have interests in different fields within the sector.¹⁰⁹
4. The no affiliation category applies to individuals that have shown none of the above experiences. Usually, the professionals who fall into this category are academics, lawyers (except the ones specialized in competition for the respective agency) or public servants who are not directly chosen by the government.

Distribution of Board Members per Previous Professional Experience

Table VIII.1 and figure VIII.1 display the distribution of appointments by category of previous professional experience. Percentages in table VIII.3 do not add up to 100% and the explanation is provided by figure VIII.1, which shows that many of the individuals’ experiences overlap: 32 appointments refer to people that had previously held both political offices and politically appointed jobs in the public sector, 28 correspond to individuals that had had a job in the industry and in politics and 12 of them had prior experiences that matched all three categories.

¹⁰⁸ “Reserva de luxo” in the original

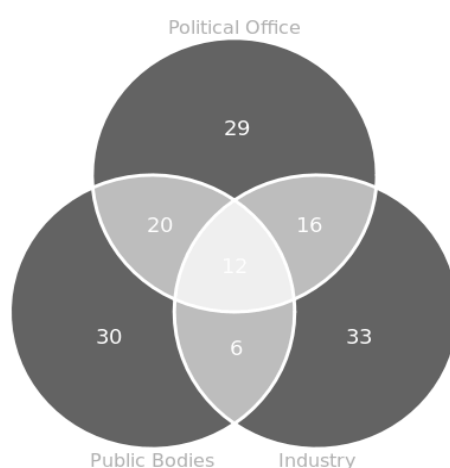
¹⁰⁹ In the case of the competition regulator, we coded as experience in the industry having worked in a law firm specialized in competition.

Table VIII.1. Distribution of Appointments per Category of Prior Professional Experience

Category	Total		Head of Agency	
	Frequency	Percentage	Frequency	Percentage
Prior Political Office	77	39%	19	25%
Prior Politically Appointed Office in Public Administration	68	34%	24	35%
Prior Job in Regulated Industry	67	34%	21	31%
No Affiliation	54	27%	17	32%

The majority of those 12 cases correspond to people appointed to the transportation agency and is explained by the particular characteristics of the sector. It is made up mainly by state-owned companies, such as railway or seaport managing companies, which make them fall simultaneously in the industry and the public sector categories. However, it also suggests that this specific sector works as a revolving platform of appointments made by political parties. The remaining cases refer to a similar situation in the financial sector, where individuals were appointed to the state-owned bank (both industry and public body), have held political jobs and end up being chosen to the board of a financial regulator.

Figure VIII.1. Distribution of Appointments per Previous Professional Experience and Category Overlap

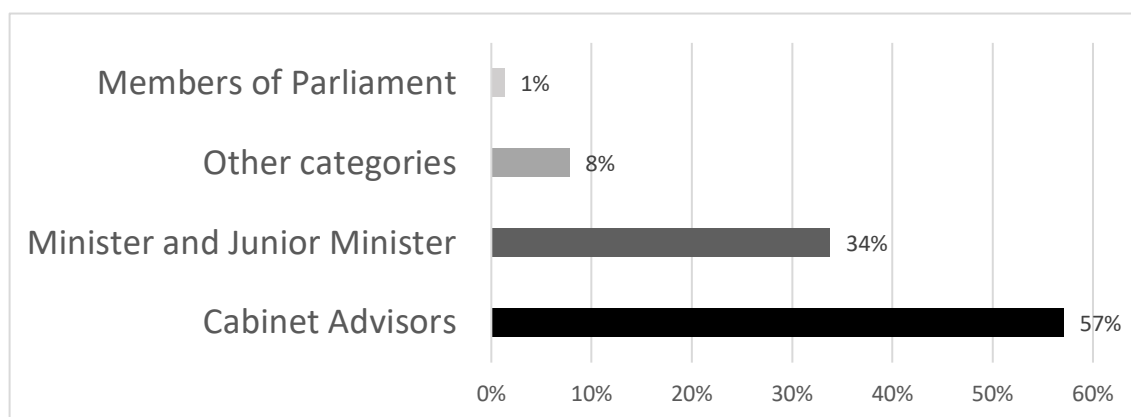


The professional background of the heads of agencies does not differ much from their colleagues of the board. Still, there are less heads of agency that had previous political experience and more with no particular affiliation. The numbers might indicate that, although governments want to appoint affiliated individuals, they also aim at projecting an image of independence with the appointment of experts.

The refinement of the data concerning the profile of the individuals with political links offers more information about possible patronage. 57% of the appointees with political experience worked as special advisors in cabinets and 34% were Ministers or Junior Ministers. Overall, a total of 91% of individuals with political experience appointed to IRAs worked in the executive (figure VIII.2.).

Figure VIII.2. Previous Political Office of Board Members

(% of the type of office per individuals with prior political experience)



Distribution of Board Members per Appointing Government

Regarding the ideology of the appointing governments, left-wing governments have made 63% of appointments, compared to 37% appointed by right-wing ones, as shown in table 8.2. This discrepancy is explained by two factors: the number of years that both parties or coalitions were in power since 1990 (roughly eleven years for the center-right parties

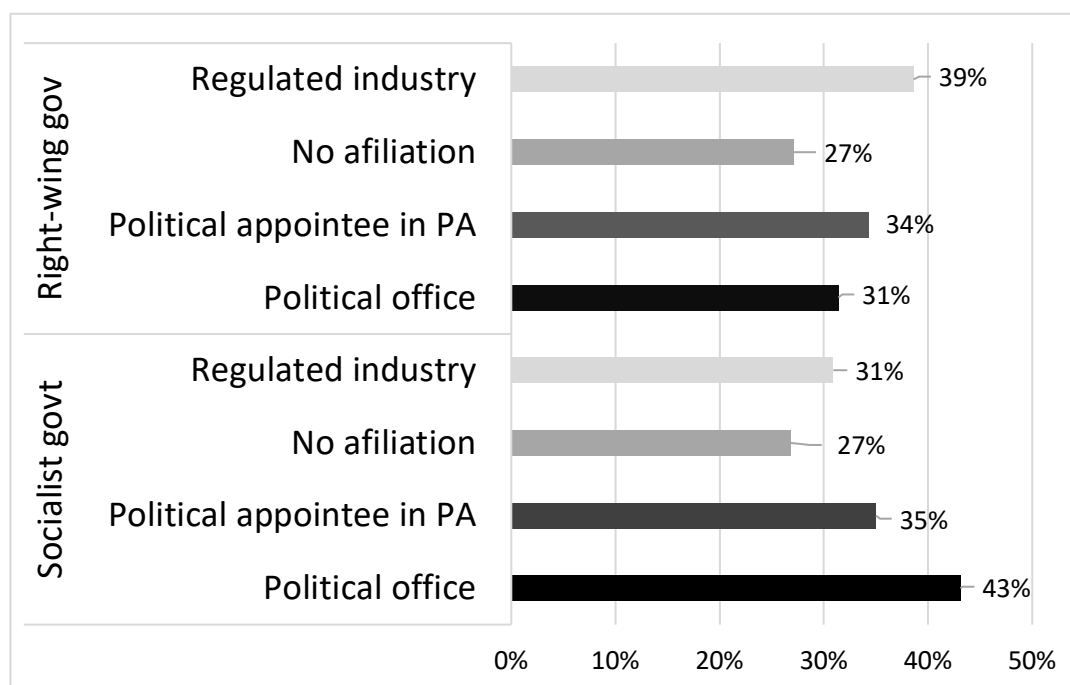
and sixteen years for the Socialist party) and the number of functioning agencies (from one in 1990 to eleven in 2019).¹¹⁰

Table VIII.2. Distribution of Appointments per Government Ideology

Appointing Government	Appointments	% of Appointments
Left-wing	125	63%
Right-wing	74	37%

On what concerns the appointing party, there are slight variations in the profile of individuals appointed by left-wing and right-wing governments (figure VIII.3.). The former tends to appoint more individuals with a political background than right-wing governments (43% vs. 31%).

Figure VIII.3. Distribution of Categories of Individuals According to the Ideology of the Appointing Government

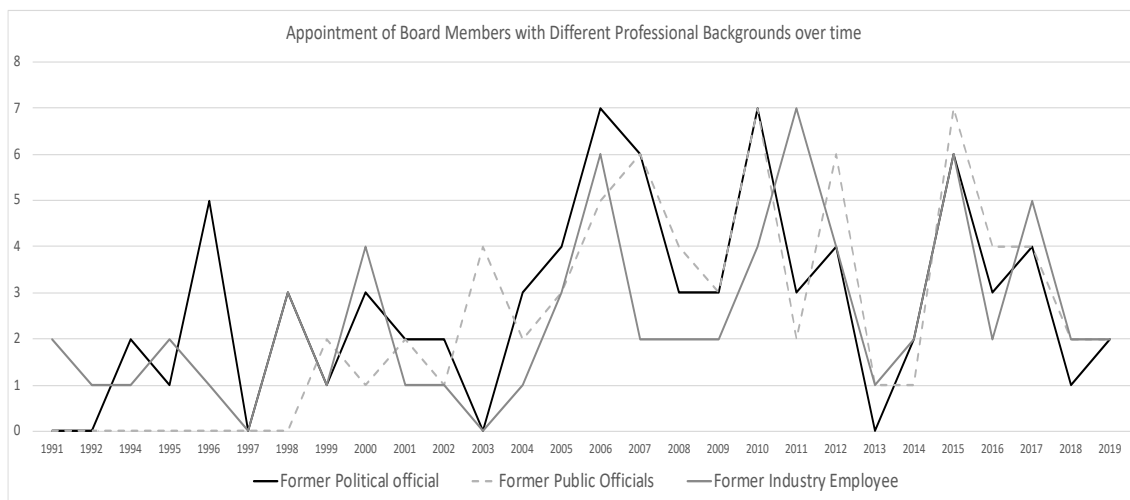


¹¹⁰ Please refer to chapter V

The latter have chosen more individuals that have previously worked in the regulated industry, both in comparison to socialist executives (39% vs. 31%) and to other categories of appointed board members. There are barely any differences in the percentage of nominations of individuals that previously held politically appointed offices in public bodies, as around one-third of appointments of both types of governments fall in this category. Similar results emerge in relation to individuals that have no political affiliation and no previous jobs in the regulated industry.

It is also worth highlighting that appointment of board members with previous political experience peak in electoral years or the following one, particularly in 1996 (Guterres I), 2004/2005 (Santana Lopes),¹¹¹ 2006 (Sócrates I) and 2010 (Sócrates II). The evolution of the appointment of different categories of board members over time is showed in figure 8.3. Signs that patronage was used for control purposes are clearer. There seems to be two exceptions. One is the 2002-2004 Barroso government, which in comparison to previous and subsequent executives, did not appoint a significant number of party loyalists.

Figure VIII.4. Appointment of Board members with Different Professional Backgrounds Over Time



¹¹¹ PM Santana Lopes began his period in office in mid-2004, which only lasted until the early months of 2005.

The other is the last year of the Passos Coelho government, which witnessed a peak in the appointment of politically experienced individuals, thus suggesting more intensions of reward than control. These results should be linked and further explained in the sector on early departures.

The distribution of board members per sectors

On what concerns the distribution of appointments per sector, the financial agencies have had the majority of appointments, closely followed by utilities (table VIII.3.). This is justified by the fact that these are the older agencies, which creation dates back to the mid-1990s. On the contrary, agencies that fall in the category of “others” – health, competition, media– were set-up after 2001, with the exception of civil aviation.

Table VIII.3. Distribution of Appointments per Sector

Sector	Appointments	% of Appointments
Financial	71	35.7%
Utilities	69	34.7%
Others	59	29.6%

The professional and political background of board members according to sectors has also been measured, as described in figure 8.3. The financial sector is the one in which there more people with a background in the regulated industry, corresponding to more the 50% of appointments in the sector. More, of those board members that had prior experience in the financial industry, half (18 appointments/14 individuals) had or will have after leaving office professional links with the public bank, CGD. Governments tend to appoint party loyalists mostly to utilities, as 46% of all board members in these IRA had prior political experiences. However, the financial sector is very close to utilities in the share of former politicians (42%).

Figure VIII.5. Background of Board Members According to Sector

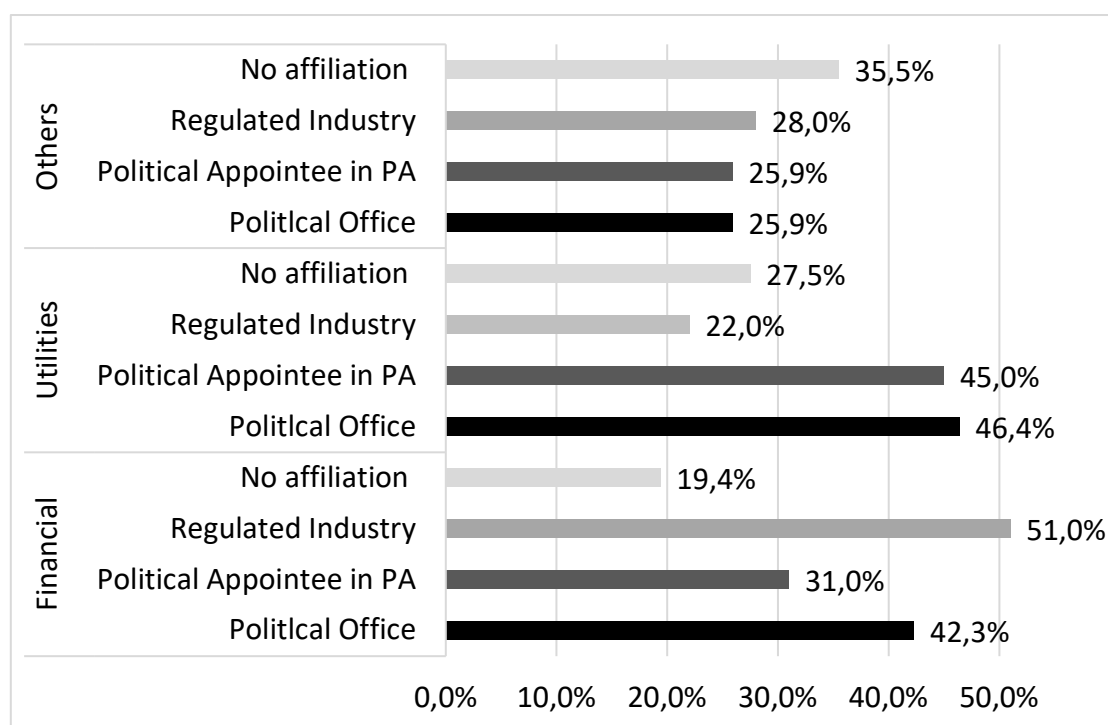


Table VIII.4. breaks down the data per agency. If the transportation agency is excluded, given it is a special case, as explained above, trends become even clearer. In the banking regulator, 62% of its board members come from the regulated industry, a share that is only followed from a far by the securities and the media regulators (both with 47%). Also, worth underlining is the fact that another agency from the financial sector displays the higher percentage of board members with prior political experience, i.e., the insurance and pension funds agency (53%). It is closely followed by the energy regulator, whose half its members have held political jobs. The health regulator is the one that displays higher percentages of board members with no affiliation to the industry or to political parties, followed by competition.

The case of the utilities is interesting from another perspective. When looking at the percentage of politically affiliated board members in each agency - 93% in transportation, 50% in electricity and gas and 47% in telecommunications and postal services, we conclude that governments have difficulties letting go of the control of the market (table VIII.4.).

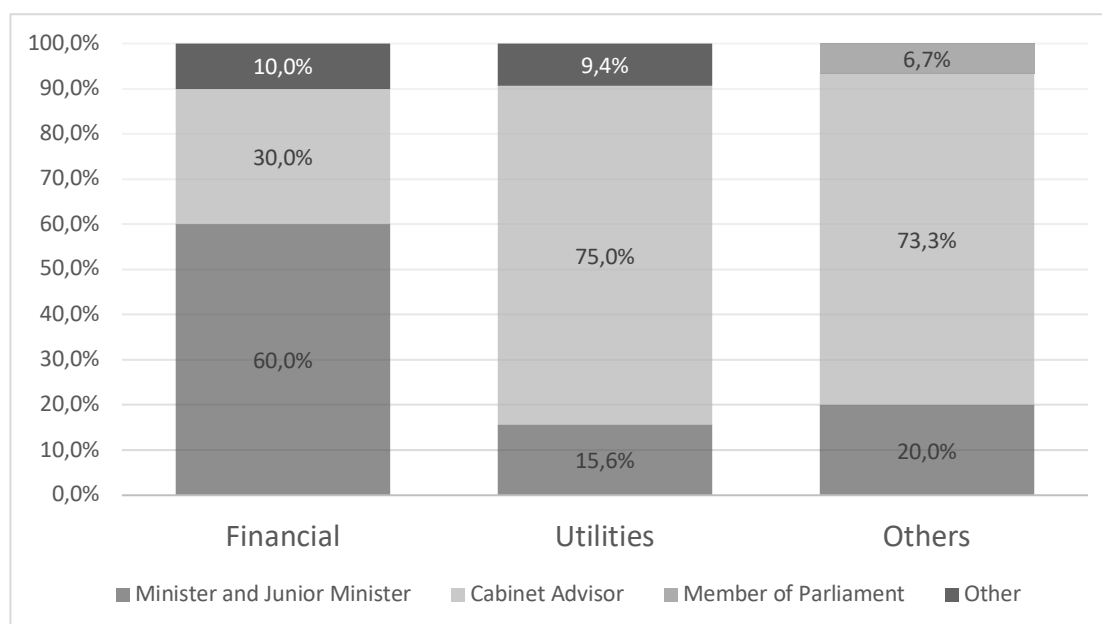
Table VIII.4. Distribution of Board Members per IRA According to their Previous Work Experience.

Agency	Political Office	Public Bodies	Industry	No Affiliation
<i>Competition</i>	1 (8%)	4 (33%)	2 (17%)	5 (42%)
<i>Transportation</i>	12 (93%)	13 (100%)	7 (54%)	0 (0%)
<i>Civil Aviation</i>	4 (20%)	7 (35%)	5 (25%)	6 (30%)
<i>Telecom/Postal</i>	10 (44%)	2 (9%)	6 (26%)	8 (35%)
<i>Insurance/Pensions</i>	8 (53%)	7 (47%)	6 (40%)	0 (0%)
<i>Banking</i>	11 (42%)	5 (19%)	16 (62%)	8 (31%)
<i>Securities</i>	11 (37%)	10 (33%)	14 (47%)	6 (20%)
<i>Media</i>	7 (47%)	3 (20%)	7 (47%)	1 (7%)
<i>Health</i>	3 (21%)	2 (14%)	2 (14%)	9 (64%)
<i>Water And Sewage</i>	3 (17%)	11 (61%)	1 (6%)	5 (28%)
<i>Energy</i>	7 (50%)	4 (29%)	1 (7%)	6 (43%)

The motivation (and signs of control) are stronger in markets that have not yet been fully privatized or liberalized. As noted by Jordana et al. (2006), in Portugal, the liberalization of the telecommunications market occurred faster than the electricity one. The findings are confirmed and extended to the railway sector by the OECD data on sector liberalization (Koske et al. 2014). It seems that, within the utilities, agencies that regulate sectors with a stronger presence of the state, are also more populated by board members affiliated with governments.

When analyzing the distribution of political loyalists per sector (figure VIII.4.), other trends are particularly noticeable: i) cabinet advisors make up to three-quarters of nomination in all IRAs, except the financial ones; ii) the latter tends to attract more senior officials, such as ministers (60% of politically-affiliated nominations). The findings reinforce the conclusion that IRAs are used for patronage of control, but also of reward. On what concerns the financial regulators, one more conclusion can be drawn. The politically experienced individuals placed in the boards are mostly senior officials, which may strengthen the leverage of agencies.

Figure VIII.6. Distribution of Board Members with Political Experience per Sector



The timing of office transitions

Finally, we paid attention to the timeframe of the appointments of board members. The *ex-ante* cooling-off periods for the appointment of industry experts are prescribed in some agency statutes, as shown in chapter VI about *de jure* independence. In the same chapter, we mentioned an unsuccessful 2009 bill that proposed a similar mechanism for the transition between political and regulator's offices. Currently, when in place, both *ex-ante* and *ex-post* cooling-off periods are set for two years.¹¹² Therefore, we applied the same criteria – two years – to understand whether politically experienced individuals transitioned (almost) directly to the regulator or they had a quarantine period. In all categories, the majority of board members took office immediately after leaving their previous job or were even appointed while in office (figure VIII.7). In all categories, more than half of political loyalists were awarded a board member position right after they left their political offices (figure VIII.8).

¹¹² Please note that some agencies do not have such provisions in place. Confirm chapter VI.

Figure VIII.7. Timeframe of Appointments

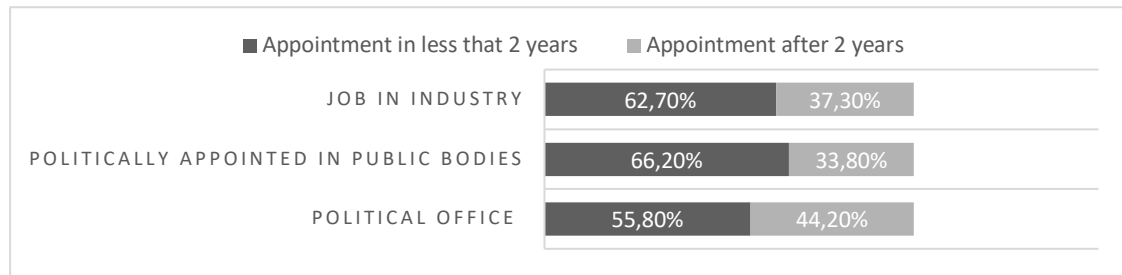
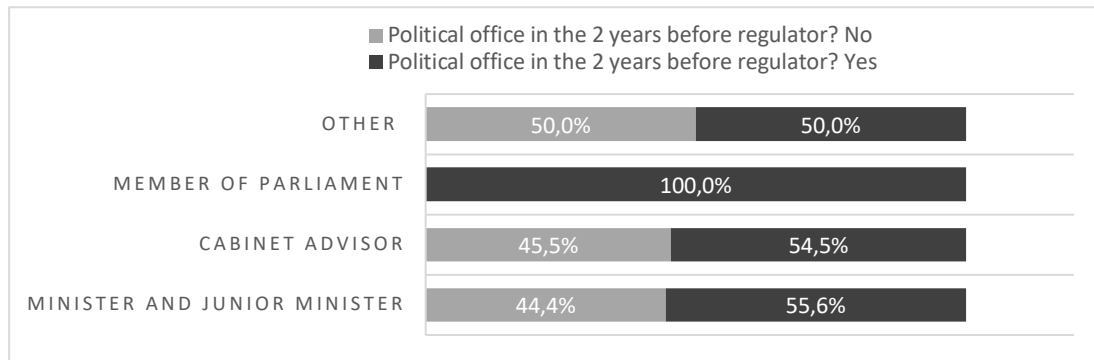


Figure VIII.8. Timeframe of Appointments of Politically Experienced Individuals



8.4. Multivariate Analysis

For a deeper understanding of what determines the choice of a certain profile of board member, we now proceed to a multivariate analysis of the data. In what concerns the independent variables, we used the ones explained in chapter VII and summarized in tables VII.4: sector category, the ideology of the appointing government, the degree of formal independence and the old age of the agency. The dependent variables are dichotomic, as 1 means the appointed individual falls in a given category and 0 means she does not. Therefore, we employ logistic regression. The results are presented in table VIII.9.

Table VIII.5. Correlates of Previous Career Features of Appointees (Logistic Regression)

Independent variables	<i>Dependent Variable: appointee with a previous political career</i>	<i>Dependent variable: appointee with a previous career in the regulated industry</i>	<i>Dependent variable: appointee with a previous career in public administration</i>
Sector (reference category: Other)	-1.29 (.26)***	-.13 (.35)	.95 (.18)***
Competition	.76 (.42)**	.97 (.38)*	.24 (.36)
Financial Utilities	1.12 (.45)*	-.40 (.59)	.66 (.73)
Socialist government	.39 (.25)	-.44 (.27)	.02 (.25)
De jure independence of agency	.155 (1.42)	-.13 (1.25)	-2.39 (1.08)*
Age of agency	-.04 (.02)*	.01 (.03)	.03 (.04)
Constant	-1.72 (.87)*	-.64 (.54)	-.15 (.49)
N	199	199	199
Pseudo R2	.05	.06	.04

Standard errors (clustered on agencies) in parenthesis; +p<.10; *p<.05; **p<.01; ***p<.001

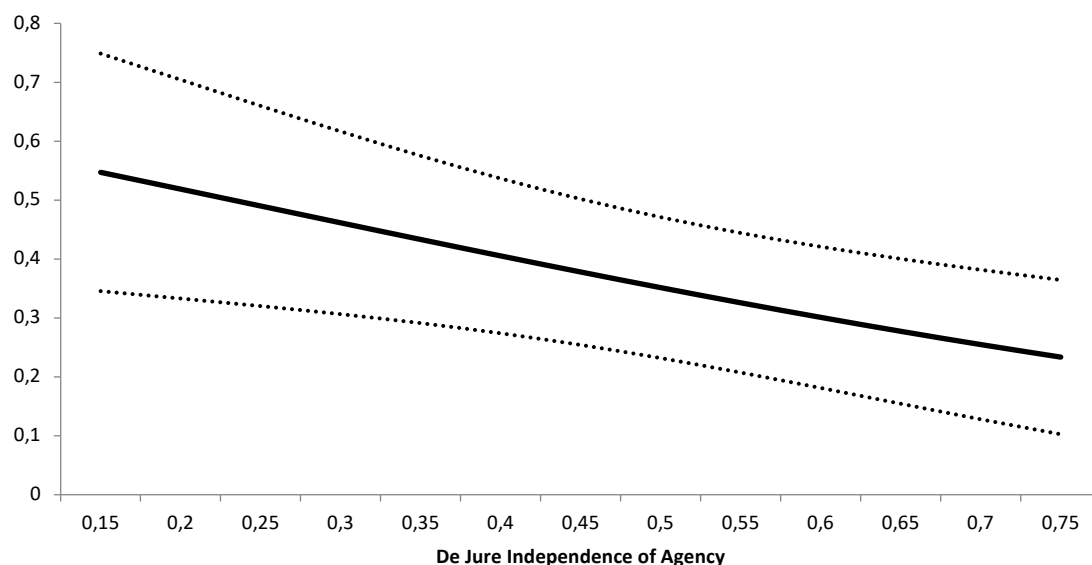
Does the ideology of the appointing government matter?

The logistics regressions did not identify any predictable pattern in the appointment of board members by ideologically different governments (table VIII.9.). Our expectations that, due to motivational credibility commitments, left-wing governments would politicize less appointments are not confirmed. Neither it is confirmed that right-wing governments tend to appoint more individuals with industry links. However, other variables seem identify other patterns and explain them. Below we test for other hypotheses.

Does formal independence matter?

The existing studies on the impact of formal independence in the degree of external influences of IRAs, particular by politicians have reached contradictory and inconclusive results (Enns-Jedenastik 2016b; Hanretty and Koop 2013; Maggetti 2007; Thatcher 2002). Our model indicates that formal independence only has an effect on the probability of choosing a board member that has previously taken up a politically appointed job in the public administration. As figure VIII.10. shows, the probability of appointing an individual with such a profile decreases as formal independence increases.

*Figure VIII.9. Probability Of Appointing an Individual With Public Office Experience Depending on the Values of Formal Independence**



*Based on table VIII.5

The results suggest that insulation from the central public administration through formal independence, also means a de facto insulation, as board members are no longer among those of senior political offices pool as formal independence increases. Yet, there is no effect on the recruitment of individuals with political or industry links. The most illustrative examples are the agencies that experienced a significant increase in their formal independence degree after their inclusion in the framework law for the regulatory agencies.¹¹³ For instance, the civil aviation agency had always been managed by senior public officials until 2015, when it officially became an independent regulator. Following that change in the status, two politically linked board members were appointed, as well as two others with links to the industry.

While it is not possible to follow the reasoning that more formal independence bodies are also the ones more subject to the control of political parties through their loyalists (Ennser-Jedenastik 2014a), it is also not possible to confirm the opposite. In fact, the study that is closer to ours, because it combines political and industry independence, is also the one whose results are closer to ours. Furthermore, it also suggests that the successive legal reforms studied in chapter VIII do not seem to have had significant impacts so far.

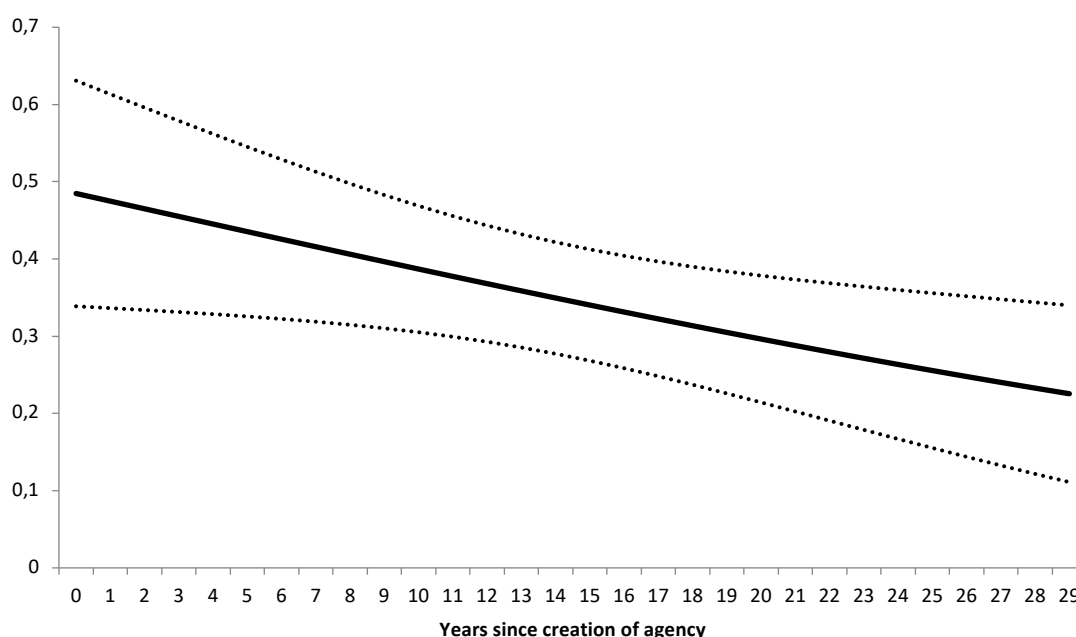
Does the old age of the agency matter?

Our model also tests the influence of the old age of agencies, following on the one hand, the scholarship of the lifecycle of agencies and, on the other, the ones on reputation. The first claims that over time agencies become more vulnerable to capture by the regulated interests. The second posits the opposite: with time, agencies gain reputation, and become stronger and less influenceable. Figure VIII.11. suggests that over time governments become less likely to appoint their loyalists. There are no significant effects of age in the appointment of people coming from the industry or from senior officers in the public administration. Thus, the two hypotheses advanced by the theoretical streams are dismissed. If the logic is replicated in the relationship with principals, then the reputation

¹¹³ Please confirm chapter VI

argument could make sense. Nevertheless, an alternative explanation might be possible. The 2013 FLIRA introduced a role for the parliament and the public appointments advisory body, CRESAP, in the selection process of board members. The individuals chose by the executive need to go through an evaluation of CRESAP and be heard in a parliamentary committee. A later amendment to FLIRA reinforced the role of parliament, making obligatory the drafting of an opinion of the parliamentarians about the candidate. Both opinions are not binding, as the Council of Ministers still has the final saying,¹¹⁴ but CRESAP and the parliament may now be considered as informal veto players, with some degree of influence. In fact, the examples mentioned in the beginning of the chapter are such a sign of influence.

*Figure VIII.10. Probability of Appointing a Board Member With Previous Political Experience Depending on the Age of the Agency**



*Based on table VIII.5

It is interesting to note, however, that appointment of board members with previous political experience peak in electoral years or the following one, particularly in 1996

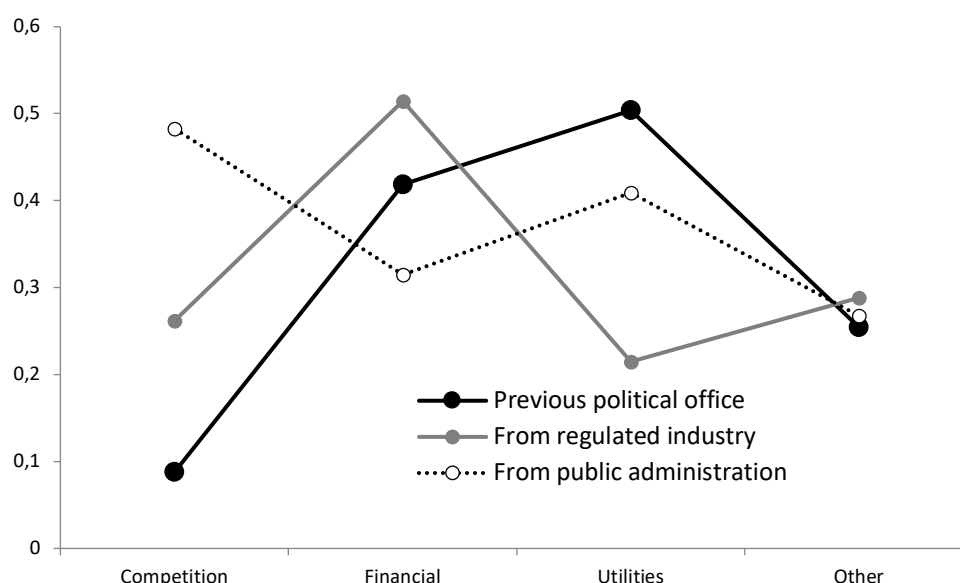
¹¹⁴ Given that the opinions of CRESAP and parliament are not binding, and the governments maintains its role of exclusive nominator of board members, the values in the appointment indicators of the formal independence index were not affected by the FLIRA provisions.

(Guterres I), 2004/2005 (Santana Lopes), 2006 (Sócrates I) and 2010 (Sócrates II). The evolution of the appointment of different categories of board members over time is showed in figure VIII.8. Signs that patronage was used for control purposes are clearer. There seems to be two exceptions. One is the 2002-2004 Barroso government, which in comparison to previous and subsequent executives, did not appoint a significant number of party loyalists.

Do sectors matter?

The descriptive statistics showed that governments had appointed party loyalists mostly to utilities. However, the financial sector was very close to utilities in the share of former politicians. The logistic regressions confirm the results (VIII.12). The probability of appointing an individual with previous political experience is higher in agencies regulating utilities. In the financial regulators, it is more likely to observe appointments coming from the industry. Yet, the probability that these board members have political experience is also strong.

*Figure VIII.11. Probability of Appointees Coming From Political Office, Regulated Industry and/or Public Administration By Agency Sector**



*Based on table 8.5

8.5. Output level: The After Life of Board Members

The literature on regulatory capture stresses the relevance of the after-office career of board members as a sign of potential capture of agencies. Theoretical and empirical research posits there is a risk that board members who move on to positions in the industry may have been more favorable to their regulatees, because they were promised a job or expected that while in office. In previous chapters, it was suggested the same logic could be applied to political principals: taking a political job or a politically appointed office in public administration after being a regulator may be a sign that the individual's actions were favorable to governments and, therefore, is being rewarded for his favors. In this section, we track the professional and political paths of individuals that have left the office to measure the intensity of the revolving door and the evidence of potential capture or politicization.

Descriptive Statistics

For this section, we used the data of the board member database. Instead of 199 appointments, we reduced the universe to 145. The decrease is the outcome of two factors: i) the individuals in office by 2019 or who just ended their mandate were removed since they do not have a post-regulator career yet; ii) several individuals completed more than one mandate, so the appointments before the last one were not considered. Likewise, the analysis of the *ex-ante* career of board members, we coded the ex-post professional experience of board members according to four categories:

1. Political Office, i.e., whether the individual who held a position in the executive or legislative (at the national, regional or local levels), in the European Parliament or in the main political party structures.
2. Politically appointed offices in public bodies, such as central administration, state-owned companies or other autonomous bodies, including other regulators.
3. Jobs in the regulated industry. While in the majority of cases, were considered the direct link between the industry and the regulator (i.e., the electricity company and the energy agency), in the case of the financial sector, we considered any experience in financial companies as relevant for any of the sectoral agencies.

4. No affiliation applies to individuals who do not fall in any of the above categories. This category is the most complex one, as it mixes individuals that have jobs in areas other than those three categories, but also those that possibly retired and those for which there was no information publicly available.

Distribution of Career Options of Board Members per Previous Professional Background

On what concerns the distribution of board members according to their before and after office professional paths, 42% of the individuals either proceeded to a job that does not fit into our categories or retired (table VII.6). Once again, the percentages in table VII.6. do not add up to 100%, because either some individuals have taken up more than one job in the following years or the position, they took falls into two categories (Figure VII.12.).

Table VIII.6. Distribution of Board Members According to Their Before and After Office Professional Paths

Before office in Regulator			After Office in Regulator	
FREQUENCY	Percentage	Category	Frequency	Percentage
77	39%	Political Office	21	18,8%
68	34%	Politically Appointed Office in Public Bodies	32	28,6%
67	34%	Job in Regulated Industry	28	25%
54	27%	No Affiliation/ No information	61	42%

Seven former board members took both political and industry jobs and six of them worked in financial agencies. Another seven former board members moved to the industry but also to the public sector. Once again, the majority of those cases – five - are linked to the financial sector. They were all placed in CGD, the public bank. The remainder worked in utilities agencies.

Figure VIII.12. Distribution of Appointments per Post-Regulator Career and Category Overlap

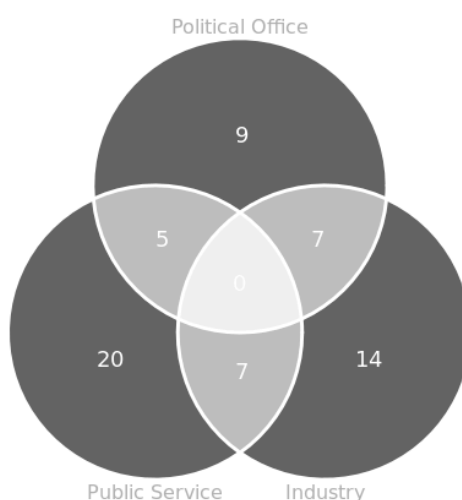
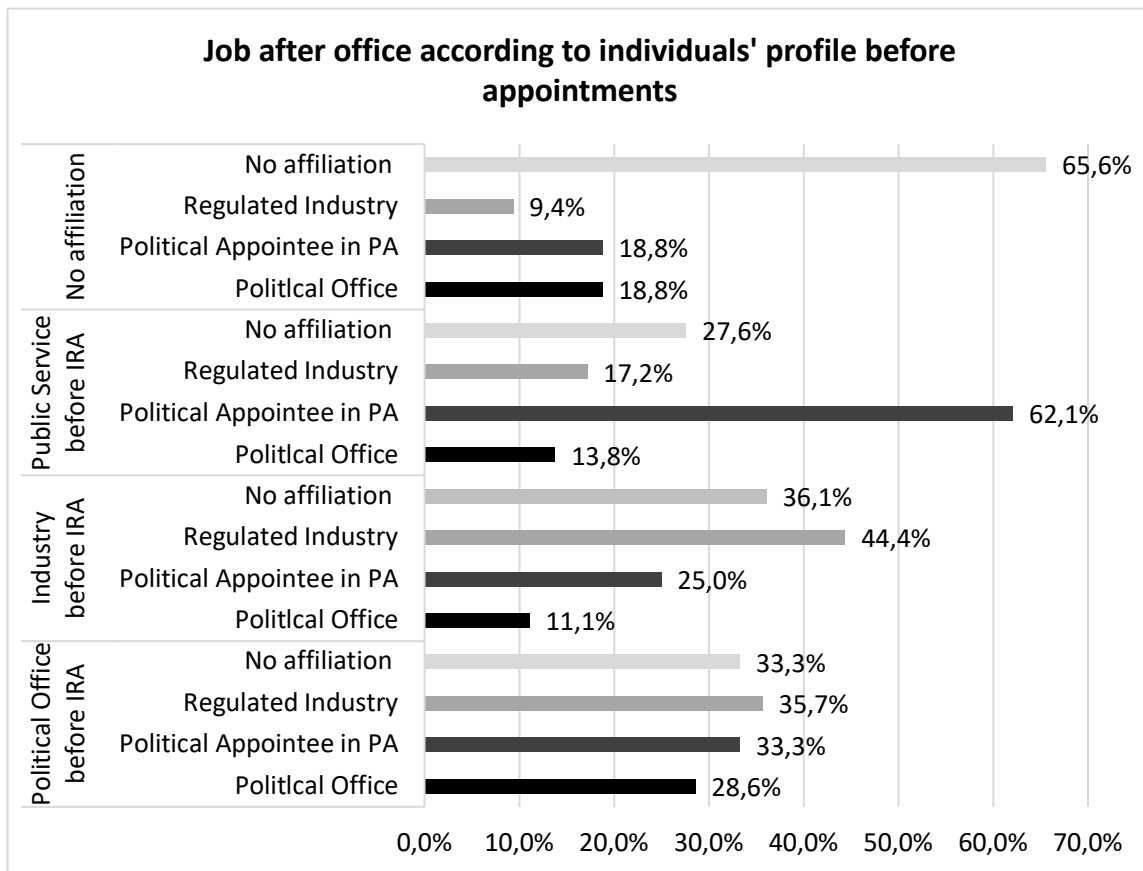


Figure VIII.13 shows the distribution of post-IRA jobs according to the professional profile of the individuals before being appointed. Board members tend to go back to their previous careers. This is particularly true in the case of individuals with no affiliation (66%) or with politically appointed jobs in the public service (62%), but also relevant for those who came from the industry they regulated (44%). The exception seems to be those who, prior to the appointment to the IRA, had held political offices. In these cases, not only the distribution among all the categories is more even, as taking a political office after the regulator is the least frequent option. This may suggest that, for a party loyalist, being a board member in a regulatory agency serves a trampoline to other jobs.

Figure VIII.13. Distribution of Post-IRA Jobs According to The Professional Profile of The Individuals Before Being Appointed



Distribution of Career Options after IRA per Sector

Figure VIII.14 shows the distribution of jobs after office according to the sector regulated by the board member. The financial sector stands out, as more than half of the board members (54%) of the sector's IRAs end up working for the industry. A significant number of financial regulators are also appointed to positions in the public service (37%), compared to the ones that previously worked in utilities (24%) or other sectors (25%). They are also often appointed to senior positions in the public administration, which can be other regulators or, once again, the public bank, CGD.

Figure VIII.14. Distribution of Jobs After Office According to The Sectors They Regulated

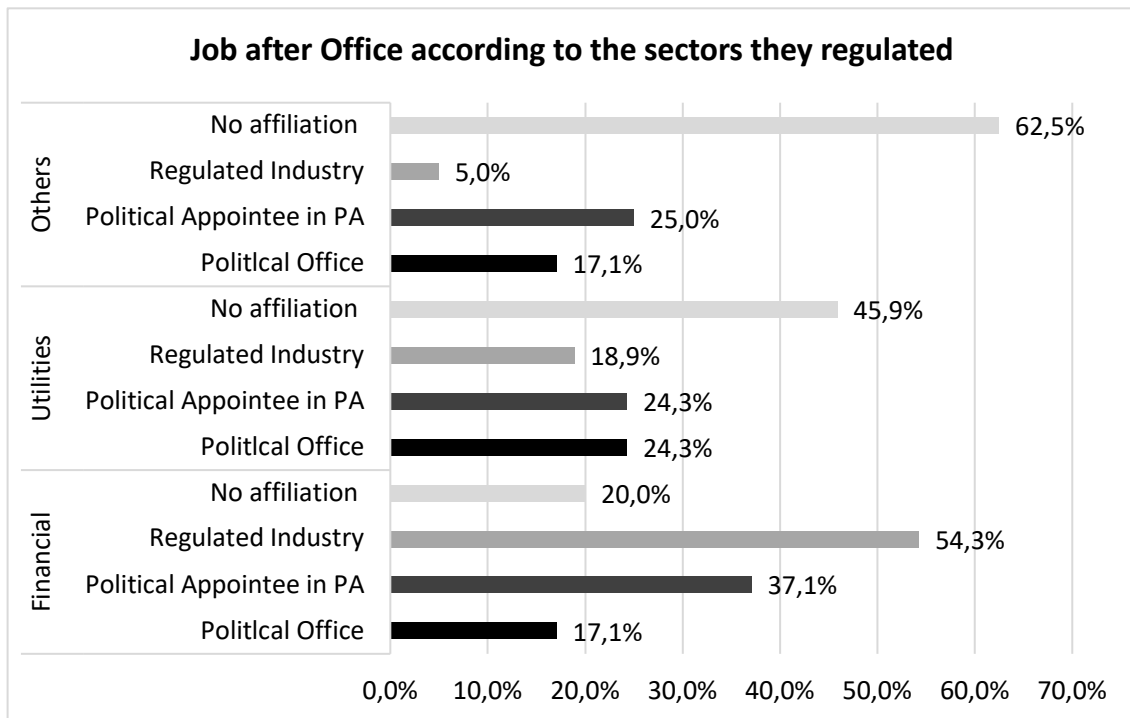


Table VIII.7. breaks down the data per agency and, if once again the transportation agency is excluded due to particular features of the market, results become clearer. The financial regulators stand out, as 70% of the board members of the securities agency and 46% of the board members of the central bank finds jobs in the regulated industry once they leave office. Almost half of the former board members of the central bank and the insurance and pension funds agency are placed in by governments in other public offices. One third of board members of the telecommunications and of the securities agencies take up political offices.

Table VIII.7. Distribution of Former Board Members Per IRA According to Their Career After Office

AGENCY	POLITICAL OFFICE	PUBLIC BODIES	INDUSTRY	NO AFFILIATION
Competition	2 (28,6%)	3 (42,9%)	0 (0%)	4 (57,1%)
Transportation	1 (33,3%)	3 (100%)	1 (33,3%)	0 (0%)
Civil Aviation	0 (0%)	6 (40%)	1 (6,7%)	8 (53,3%)
Telecom/Postal	5 (31,3%)	2 (12,5%)	4 (25%)	7 (43,8%)
Insurance/Pensions	0 (0%)	3 (50%)	2 (33,3%)	1 (16,7%)
Banking	1 (7,7%)	6 (46,2%)	6 (46,2%)	8 (30,8%)
Securities	5 (31,3%)	4 (25%)	11 (68,8%)	3 (23,1%)
Media	1 (11,1%)	0 (0%)	1 (11,1%)	7 (77,8%)
Health	3 (33,3%)	1 (11,1%)	2 (14,3%)	6 (66,7%)
Water and Sewage	2 (20%)	4 (40%)	0 (0%)	4 (40%)
Energy	1 (12,5%)	0 (0%)	1 (12,5%)	6 (75%)

8.6. Multivariate Analysis

For a more comprehensive understanding of what influences the career of board member once they leave the regulatory office, we now proceed to a multivariate analysis of the data. In what concerns the independent variables, we used the ones explained in chapters VII and VIII and summarized in tables VII.1 and VII.2: sector category, the degree of formal independence and the job of the board member before his appointment. The latter, which in the previous section was a dependent variable, now becomes an independent one. The dependent variables are dichotomic, as 1 means the appointed individual falls in a given category and 0 means she does not. Therefore, we employ logistic regression. The results are presented in table VIII.8.

Table VIII.8. Correlates of the Subsequent Career of Appointees (Logistic Regression)

Independent variables	Dependent Variable: political office	Dependent variable: regulated industry	Dependent variable: public administration
Sector (reference category: Other)	1.15 (.71)	-	-.10 (.41)
Competition	-.11 (.74)	2.58 (.59)***	1.07 (.41)*
Financial	.52 (.70)	1.06 (.51)*	-.79 (.64)
Utilities			
<i>De jure</i> independence of agency	.29 (1.24)	-2.79 (1.55)+	-4.66 (2.90)
Political career bef. appointment	1.18 (.70)+	.88 (.64)	.54 (.38)
Industry career bef. appointment	-.43 (.70)	.96 (.64)	-.30 (.54)
Public admin career bef. appointment	-.71 (.76)	-.35 (.49)	2.64 (.54)***
Constant	-2.17 (1.08)*	-2.14 (.66)**	.20 (1.10)
N	145	145	145
Pseudo R2	.08	.24	.29

Standard errors (clustered in agency) in parenthesis; +p<.10; *p<.05; **p<.01; ***p<.001

Does the formal independence determine the post-IRA career?

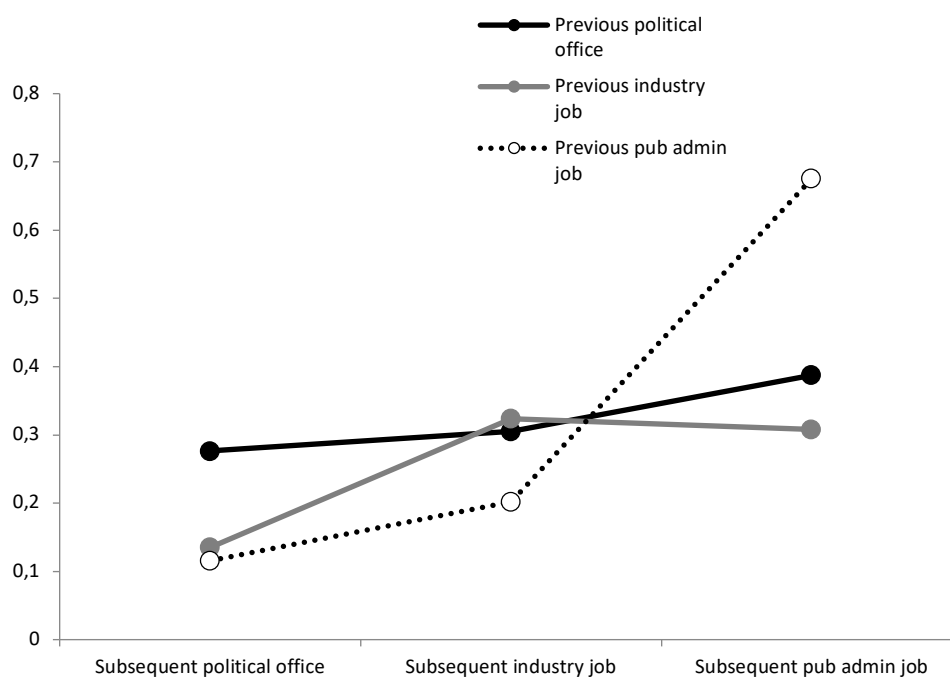
Frequently, the legal statutes of agencies include *ex post* cooling off periods for board members to accept jobs in the regulated industry. As explained in chapter VI, the inclusion of such provisions was gradual due to the reforms that were introduced over time. In this analysis, we tested the impact of the degree of formal independence on the career path of former board members. While the results did not show any effect of this variable in other careers, in the case of the regulated industry results are very very close, almost suggesting a negative effect.

Does the previous career determine the post-IRA path?

The multivariate analysis confirms previous results regarding the effect of the previous career of board members on the post regulatory life. The effect is particularly strong for individuals with a career in the public administration. It should be kept in mind,

nevertheless, that what is considered is politically appointed jobs in the public administration, both before and after the regulator. This means that the career of the individual is still dependent on the will of political parties and these individuals may correspond to the so-called “luxury reserve”, i.e., a group of people that political parties, when in power, always nominate for senior public offices (Silva 2013). The second conclusion regarding the destiny of politicians that took up regulator jobs is also confirmed. They are not likely to go back into politics after their mandate in the regulatory agency, suggesting that the latter is a trampoline to other jobs, in public administration or in the industry.

*Figure VIII.15. Probability of Regulators Going to Political Offices, The Industry And/Or Politically Appointed Offices In Public Administration By Career Before Appointment**

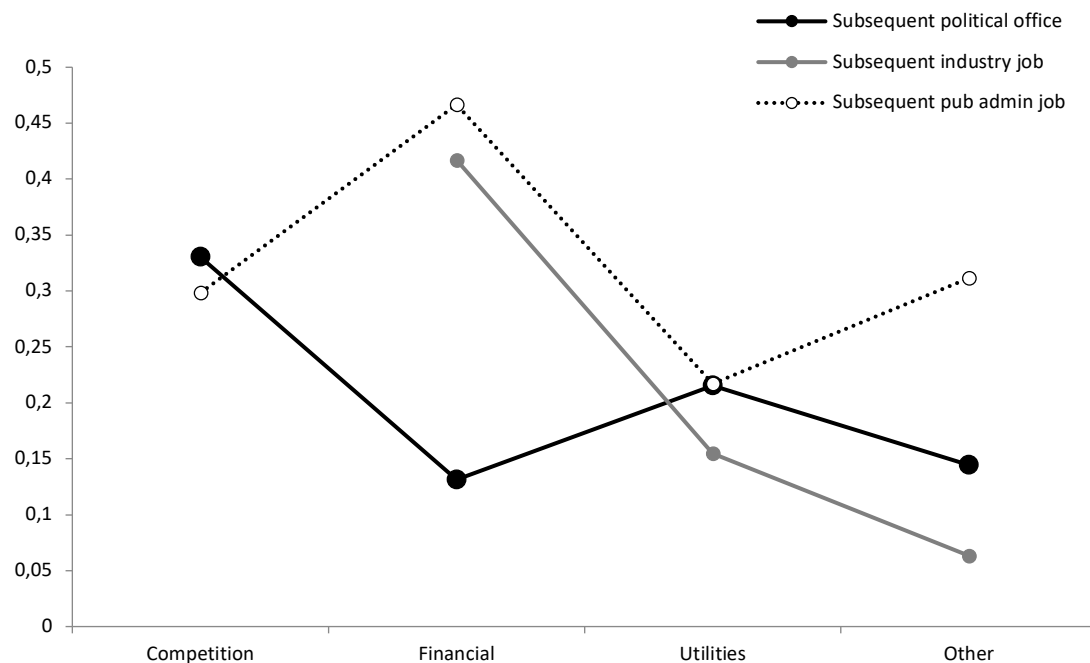


*Based on table VIII.8

Does the sector determine the post-IRA career?

The descriptive statistics showed that a significant share of the board members of financial regulatory agencies moved on to the industry they had regulated once they left office. The multivariate analysis confirmed the trend, showing that the probability of an board member of a financial regulatory agency find a job in the industry he or she regulated or in the public administration is much higher than in any other sectorial agencies.

*Figure VIII.16. Probability of Regulators Going To Political Office, Regulated Industry, and/or Public Administration By Agency Sector**



*Based on table VIII.8

8.7. Main Findings and Concluding Remarks

The influence of governments and/or the business sector in the daily activities of IRAs appears to be significant from many perspectives and occur at different moments. It can be identified through the appointment of board members, but also signaled by their career once they leave office. It can be recognized by the number and timing of early departures of those same board members, or by the interference on the financial management of agencies. Through our data and analysis, it was found that:

1. Sectors matter: there is greater propensity to appoint industry experts to financial agencies, but the number of politically experience individuals is not neglectable, particularly in the banking regulator. The utilities agencies have a significant number of former politicians. The post-regulator career is also influence by the agency's sector. And once again, the financial agencies stand out, as their board members are more likely to find jobs in the industry and/or being appointed to senior public offices, sometimes simultaneously.
2. It was found that the higher the degree of formal independence, the less likely it is for an agency to have former politically appointed public officials. This finding is further explored below. Formal independence does not play a very important role in the appointment of board member with a political or industry experience nor it constrains much their after-office career.
3. The age of IRAs matters. Over time agencies seem to distance themselves from the interference of principals. No only it is less likely that politicians are appointed to the board, as agencies undergo less budget spending freezes and, when they do, they are more prepared to challenge that interference in their managerial autonomy. The reputation argument, that posits that over time, agencies become more independent in practice is only partly confirmed (Carpenter 2010; Carpenter and Krause 2012). It is confirmed when it is applied to the relationship with political principals, as agencies tend to have less political loyalists on the board. Yet, it is not confirmed in respect to its original formulation, i.e., the independence vis-à-vis the regulated firms. No effect has been found between old age of an agency and its independence from the regulates. In fact, the connection with the regulatees remains the same, so it is not possible to dismiss

the predictions of Martimort (1999) , who posits that agencies become closer to the regulated firms and are more likely to be captured by them.

4. The ideology of the party in office plays a role in certain moments. While it is not easy to predict whether a certain government is more likely to choose politically or industry related individuals, it became clear that left-wing governments are more likely to trigger early departures. Moreover, despite not being possible to dismiss boards, changes in the party in office precede peaks of resignations. Thus, political cycles matter as well.

5. Once their mandate is over, board members tend to go back to their previous career, except if they have previous political career. In this case, individuals tend to disperse themselves among the other career options, which suggests that IRAs may have been used as a professional trampoline for other – more stable and possibly better paid - careers. The finding is reinforced by the fact that, except in financial agencies almost 75% of political appointees are cabinet advisors.

In the following lines, we draw an overview of our findings, in the light of the degree of politicization (first) and of capture by the industry (second). Finally, we focus on the specific findings about the financial agencies, which stood out among the other cases.

The influence of politicians

The proportion of board members with different profiles is fairly even. Still, it is noticeable a preference for individuals with political experience (39%), while experts with no political, public sector or industry affiliation are the least chosen group for IRAs (27%) of appointments. Many individuals fall into two categories at the same time and there are also cases of individuals that accumulate prior experience in politics, the industry and in politically appointed offices in public bodies. Leftist governments have appointed individuals with a political past, while right-wing executives tend to choose those from the industry, but no effect of ideology has been found in the choice of a particular type of board members. However, when board members leave office these party

differences blur. When board members leave office, with the exception of those with prior political experience, they tend to go back to their previous careers or retire.

Agencies as an extension of public administration

Despite most agencies being almost 20 years old and having undergone legal reforms aimed at increasing their independence, there have been no significant changes in the de facto independence of agencies and how the various governments treat them. When looking at appointments patterns in terms of sector and board members' profiles, it seems that principals still regard regulatory agencies and certain sectors as extensions of the public administration under their control. That is particularly clear in the utilities sector, in which monopolistic state-owned companies operated for decades or, as in the case of the transports sector, are still public. In the agencies supervising utilities sectors, 46% of board members have a political background and 45% had had politically appointed jobs in public bodies. Some studies had already identified this long-lasting umbilical relationship between incumbent companies and political parties, which has not been broken by privatization or liberalization processes. Our results suggest that these links extend to the regulatory agencies in terms of sector control.

Another evidence that shows that governments still aim at maintaining agencies closer than the desired arms-length is the time period in which most early departures take place. 68% of resignations take place in the first 12 months of a new government in office, showing that pressure on board members increases by then.

Agencies as objects of patronage of control....

Patronage has a double function, control and reward of party loyalists, and at times it is difficult to distinguish the two functions. Electoral cycles define much of the constitution of agencies' board. Early departures (figure IX.3) and the appointment of individuals with political experience (figure VIII.7) take place in the initial period of new governments. This timing suggests that governments practice patronage of control in IRAS.

... but also of reward

Besides trying to control agencies like they can do with public administration, as explained above, political parties use IRAs as a way to distribute perks and reward their loyalists. 57% of board members with a political background were special advisors in cabinets and individuals with this background make up to 75% of the politically experienced board members in all agencies, with the exception of financial ones. Places in agency boards are still regarded as rewards to party loyalists. Another evidence of this "jobs for the boys" phenomenon in IRAs is that, contrary to those with the public sector, industry or other types of experience, political loyalists tend to move to other career paths when they leave regulators. When mandates are over, board members tend to go back to their previous field of work, but this trend is not identifiable in the case of individuals with a political background. These tend to disperse themselves among the other categories of post-regulator jobs and, in fact, political offices seem to be the least preferred career option. Thus, board membership in IRAs works as a trampoline to other jobs.

Utilities under political control

In the face of the results, it is worth reminding why were IRAs created in the first place and highly promoted by the European Commission or the OECD. Especially in utilities, there was a strong presence of state-owned companies, frequently monopolies. So, IRAs were established as public authorities who would regulate those utilities, but due to their independence, they would avoid conflicts of interest that could arise by the Government, who ultimately managed the state-owned companies. (Cambini and Rondi 2010:8). Over time, utilities began being privatized, but at least in the Portuguese case, this process was very phased out. The golden shares owned by the state in the electricity and communications companies were only over after the 2011 bailout.¹¹⁵ In the water and railways sectors, for instance, state monopolies still stand. Moreover, regardless of being state-owned or private, powerful, long-established and entrenched national champion firms enjoyed great political influence (cf. Hayward 1995). Relationships between these firms and political parties were based on mutual favors and were frequently marked by

¹¹⁵ Please refer to chapter III.

the revolving door movements of individuals (Thatcher 2002: 962). The emergence of a third party, the IRAs, not only did not break these links as it seems to have joined the circuit and replicated patterns. The probability of a board member of a utility agency having a political background is high, as it is the presence of former politicians in former state-owned companies. According to a database on the economic links of cabinet members (Louçã et al. 2014), the electricity producer and provider EDP has had 18 former government members in its board, the major gas provider GALP has hired 16 politicians and the major telecommunications company has had 23 cabinet members.¹¹⁶

The disproportionate influence of the financial industry

The financial sector emerges as the one in which there are higher chances of capture. The metaphor of revolving door might not present itself as the most accurate one, as the circulation of individuals does not limit itself to the industry-regulator-industry movement, but also mixes political and public sector positions, creating what could be called a revolving platform. 51% of board members of financial regulators come from the industry and 54% find jobs there once they leave the office. However, there is also a strong link with politics, as 42% of board members held political offices before being appointed, almost as much as utilities (46%). Moreover, many of those who move to the public sector is assigned a job in the state-owned bank, CGD. Is hardly surprising if one bears in mind that bankers have been the most represented professional group in governments, that over two hundred individuals have taken up almost 400 positions in financial institutions before or after holding a government job and that, since the mid-1980s, all heads of the Central Bank had previously worked in the sector (Pena 2014, Costa et al. 2014).

¹¹⁶ The database dates back to 2014, so it does not include the ministers and junior ministers of the XIX government, which took office in late 2015.

CHAPTER IX - THE INFLUENCE AT THE THROUGHPUT LEVEL: AN EXPLORATORY ANALYSIS

“It needs to be highlighted the existence of a serious risk [...] of capture and heavily conditioning [the regulators’] activities, in a subtle, but highly efficient way”

Autoridade da Mobilidade e dos Transportes (2018)

9.1. Introduction

In the previous chapter, we measured the intensity of the revolving doors in both the political and the industry spheres and searched for explanatory factors for those patterns. The amount of data was significant, which allowed for a multivariate analysis that identified patterns and probabilities across sectors and over time. In this section, we take an exploratory approach, due to the quantity and quality of the data available for the chosen indicators. The aim of this methodology is to explore new or understudied indicators for future research and to search whether the findings somehow coincide with those of the previous and more systematic measurements. We examine what happens in the daily activities of agencies and how those two sides try to exert influence, by measuring three additional dimensions. The board member’s database is continued to be explored but feeding a new dependent variable – the departure of individuals before the end of their mandate. The second section looks into budget freezes imposed by the Ministry of Finance on IRAs in the recent years. These measures are directly related to the politicization of agencies, as explained further ahead. However, budget freezes have a direct impact on the ability of agencies to exercise their powers over the regulatees, thus facilitating capture. Finally, the number of court appeals filed by regulatees against regulatory decisions are examined, in order to measure the degree of conflict between the agencies and the firms.

9.2. Early Departures

For the measurement of early departures, we have the same individuals' database but narrowed the universe to 145 appointments, as those individuals who were in office by 2019 were excluded. With the exception of the civil aviation, land and maritime transportation, and the water and sewage agencies until their official designation as independent administrative bodies (with the introduction of FLIRA in 2013), the law protects board members from removal for policy reasons. Still, 30% of all appointments did not finish the mandate. Early departures were in most cases a personal decision and not a dismissal decided by the government, but the official reasons for resignation vary. Finding or having been offered more attractive positions elsewhere is a legitimate reason to leave the office. However, from the moment they are offered the position at the IRA board, individuals are aware of the tenure length, the salary and the impossibility of dismissal, which means they are fully conscious of what lies ahead before accepting the position. Looking for other options may suggest dissatisfaction with the position. In order to distinguish the causes for early departures, we investigated the justifications for each exit. Official IRAs' websites and media reports help clarify the reasons, but in some cases, it was possible to access the public declarations of board members themselves. Therefore, of the reasons for early departures we found that (table IX.1.):

1. Seven board members left the regulator because they were offered positions in the government or were running for elections in the party lists.
2. Six resigned in open conflict with the government or for lack of "work conditions". One outgoing board member stated that the government's intervention in the process of setting tariffs meant for him "the end of the independent regulation of the Portuguese electricity sector".¹¹⁷ Another one claimed, "lack of institutional support" (Nunes 2014).

¹¹⁷ The outgoing board member released a press communiqué, which was partially quoted in the following media report: Público (2006), Presidente da ERSE apresenta demissão, Público, 15th December 2006.

3. Internal divergence in the agencies has been claimed by two outgoing board members. One of them let the media know that he did not identify himself "sufficiently with the policy and management of the [regulator]".¹¹⁸
4. The most common justification advanced in the cases of early departures has been, however, very vague. For instance, one official statement mentions a dismissal at the request of the board member due to "personal motives"¹¹⁹, although the person stayed in office a little over a year.
- 5.

Table .IX.1. Reasons for Early Departure of Board Members

<i>Reasons For Early Departure</i>	<i>Number</i>
<i>Personal Reasons/ No Information</i>	12
<i>Take A Political Or Politically Appointed Office</i>	7
<i>Conflict With Government</i>	6
<i>Dismissal</i>	3
<i>Internal Matters In The Agency</i>	2
<i>Take Another Job</i>	2

Figure IX.1 presents the early departures of the agency sector. In utilities agencies, early departures are less frequent than in other sectors. Coincidentally, this is also the sector that displays a higher percentage of individuals with political links, which as figure VIII.4 in chapter VIII confirms, are the ones that resign less frequently. This finding may suggest

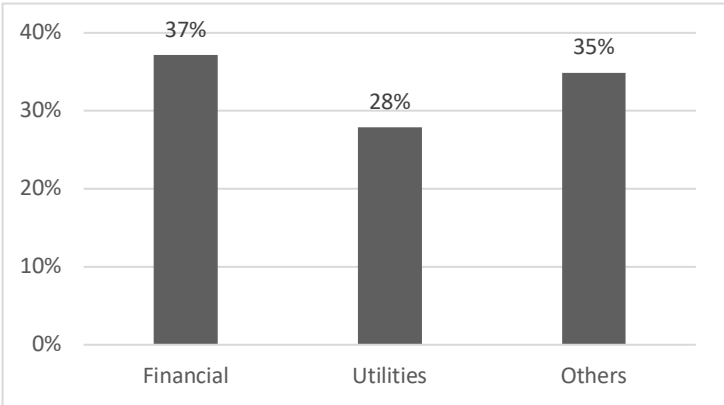
Retrieved from <https://www.publico.pt/2006/12/15/economia/noticia/presidente-da-ersec-apresenta-demissao-1279802> (accessed on 21st September 2019).

¹¹⁸ Costa (2014), Varela pede demissão por não se identificar com gestão do BdP, Sábado, 7th March 2016. Retrieved from <https://www.sabado.pt/dinheiro/detalhe/antonio-varela-apresenta-demissao-do-banco-de-portugal> (accessed on 21st September 2019).

¹¹⁹ Paredes and Pinto (2018), Nota à Comunicação Social: Afonso Silva cessa funções na CMVM, Governo de Portugal, 27th February 2018. Retrieved from <https://www.portugal.gov.pt/download-ficheiros/ficheiro.aspx?v=7acdf0d2-8e05-4daa-9247-330892438351> (accessed on 21st September 2019).

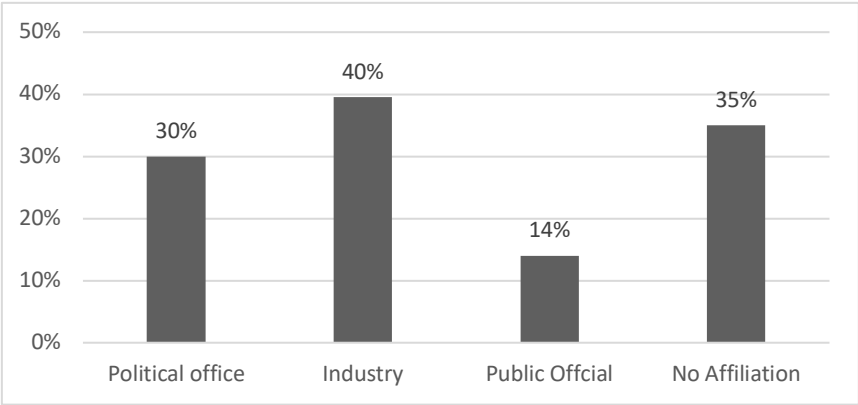
that regulators with an expert profile have less “adaptation” skills and might more easily have conflicts with principals than those who are used to dealing with politicians. Public officials and, to a certain extent, party loyalists own better survival skills in the face of political cycles. A similar association can be made for the financial agencies. This is the sector that combines the largest share of early departures (37%) and the higher number of board members with links to the industry (51%).

Figure IX.1. Early Departures by Sector



Board members with less or no political links are the ones that resign more frequently. 35% of individuals that left before the end of their mandate had no particular affiliation and 40% came from the industry (figure IX.2).

Figure IX.2. Early Departures by Board Member’s Profile



On what concerns the relationship between early departures and political parties, results are revealing (table IX.2.). Leftist governments dealt with four times more early departures than right-wing ones, even though the former were in power roughly twice as

much in time. Moreover, individuals that were appointed by leftist governments, also seem to be more prone to early departures, even during the socialist governments. This suggests that left-wing governments tend to put more pressure on board, regardless of the political links of members, and eventually generate more conflict. Although previous regressions did not show a tendency for leftist executives to choose more party affiliates than other executives, the former might expect board members in general to be compliant with the governmental expectations.

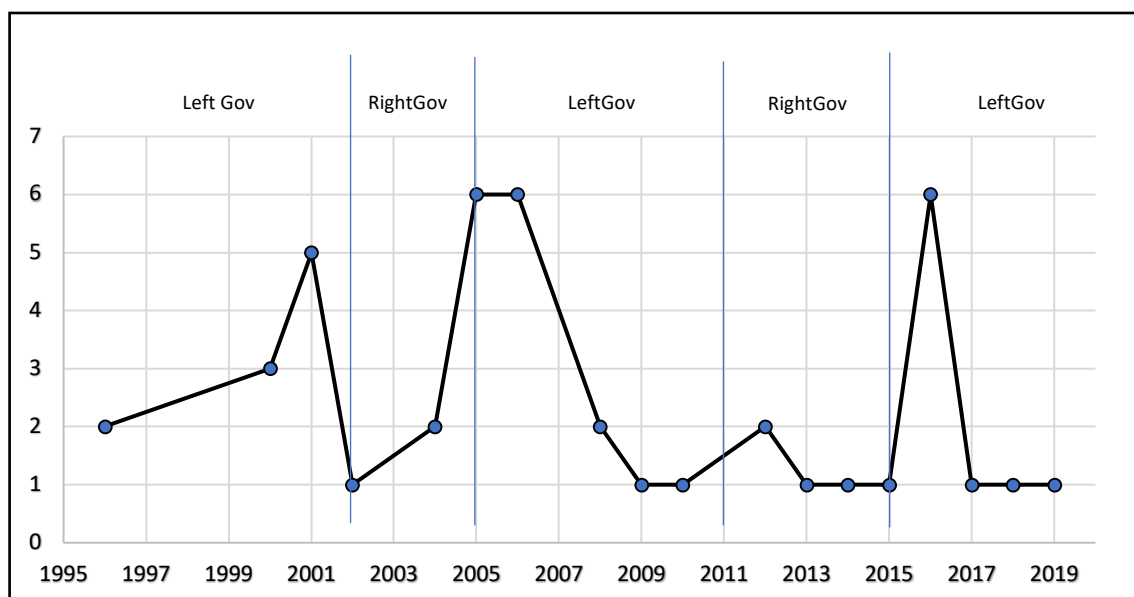
Table IX.2. Distribution of Early Departures by Government

		<i>Party in Government at the End of Mandate</i>		
<i>Nominating party</i>		<i>Left</i>	<i>Right</i>	<i>TOTAL</i>
	<i>Right</i>	17	3	20
	<i>Left</i>	18	5	23
	<i>TOTAL</i>	35	8	43

Timing of Departures

Besides the count of early departures and its relationship with party affiliation, another variable that the literature has measured is the timing of departures within a given political cycle (Ennsner-Jedenastik 2014b; Hanretty and Koop 2013). In Portugal, in most cases, there is a peak in the early departures when new political parties take office, even if executives are legally barred from dismissing board members (figure IX.3). Political cycles have an influence in the early departures of board members. The findings should be related to the data of figure IX.1, which shows an increase in appointments in the months that follow elections. Moreover, the two highest peaks of early departures took place in 2005/2006 (first months of the government Sócrates I) and 2016 (first months of Costa) coincide with the results on table IX.2, that show that early departures under socialist governments are four times higher than in center-right ones. It seems that, once in office, parties pressure board members and when they finally leave, they are replaced with party sympathizers or “friendlier” individuals.

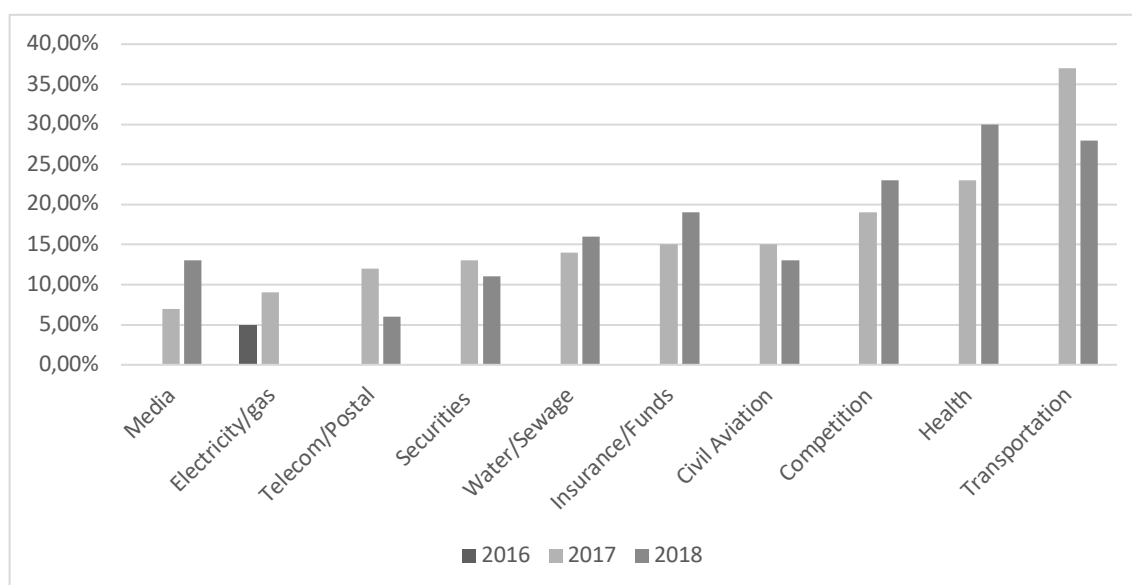
Figure IX.3. Evolution of Early Departures per Year and Political Cycle



9.3. Budget Spending Freezes

Budget spending freezes are a way to circumvent the financial independence of IRAs, affecting their oversight and enforcement capacity. Spending freezes are not an item included in the annual accounts of regulators. Therefore, the only data publicly available is the one provided by the IRAs themselves to parliament, after a request from one of the political parties. It corresponds to the budget freezes from 2016 to 2018. Since 2016, but mostly in 2017 and 2018, Portuguese IRAs were subject to spending freezes imposed by the Ministry of Finance, with the exception of the banking regulator, due to its status as a central bank. The freezes imposed on agencies vary considerably, from 5% to 37% of the budget (figure IX.4). Except for the Media regulator, which is directly accountable to parliament, the agencies that have experienced less freezes are those which simultaneously the oldest and the most exposed to external pressures for credible commitment or coercive isomorphism, such as the EU regulation – Electricity and Gas, Securities, and Telecommunication and Postal Services. Furthermore, these are also the agencies, along with the one regulating Insurance and Pension Funds regulator, that disregarded the government's instructions and unblocked the spending budgets, claiming precisely their independence status granted by national as well as community law.

Figure IX.4. Evolution of Budget Spending Freezes During The 2016-18 Period



9.4. Appeal of Regulatory Decisions

For this thesis, we tried to collect data on regulatory litigation from the IRAs. First, we consulted each IRA's annual reports, but it was not possible to extract reliable, uniformized and comparable data. Each agency has its own reporting structure and style, sometimes even changing from one year to another or from one board to the other. As an alternative, we've contacted all the IRAs requesting disaggregated data on court appeals. Unfortunately, the majority of IRAs did not respond the request, which made the efforts of longitudinal and cross-sectoral comparison useless. Given our exploratory approach, we resorted to a final alternative, which was to use data from a previous study conducted by the law and regulation research center of the University of Coimbra, CEDIPRE. Unfortunately, the data only covers appeals until 2010. While it is not the most updated data, it still offers an overview of the relationship between IRAs and the regulatees.

In 2010, CEDIPRE conducted the study on regulatory litigation, by sending a questionnaire to the various Portuguese regulatory agencies (independent and not). The questionnaire chiefly intended to know the number of processes in which each entity was a party (defendant). The nature of appeals may vary between four main types: fines (which amounted to 50% of the appeals), access to information and other administrative procedures, special administrative actions challenging administrative acts and

precautionary measures. For our study, we focus on the appeals concerning fines imposed on regulatees by IRAs, as these are the most serious sanctions and the ones that are most likely to have an impact in the activity of the firms. Table IX.3 replicates the data on fines and other sanctions collected by Gonçalves and associates until 2010.

Table IX.3. Number of Court Appeals until 2010

Agency	Number of Appeals
<i>Competition</i>	195
<i>Transportation</i>	3
<i>Civil Aviation</i>	25
<i>Telecom/Postal</i>	112
<i>Insurance/Pensions</i>	22
<i>Electricity/Gas</i>	0
<i>Securities</i>	42
<i>Health</i>	2
<i>Media</i>	No info
<i>Banking</i>	No info

Source: Gonçalves et al. 2010

CEDIPRE's study found that (Gonçalves et al. 2010: 190):

1. There is no correlation between the number of regulatees in a particular sector and the magnitude of litigation: there are sectors with few companies and extensive litigation (electronic communications) and sectors with many regulated and limited litigation (for non-independent regulators, which are not covered by our study).
2. Companies affected by the decisions of the competition and telecommunications agencies are the ones that file most of the appeals: in fact, about 60% of the regulatory litigation involves these two entities.
3. There are two types of issues that stand out clearly in the regulatory litigation in Portugal as the most frequent subject of contestation: fines and decisions on refusal of access to information.

CONCLUSIONS

“We need to close revolving doors, provide more resources to regulators and scrutinize what they do much more. Let’s not be naive about regulation.”
(Holden 2019)

Overview

In this dissertation, we aimed at answering the question “To what extent are Portuguese IRAs protected from political and industry capture?”. The choice of this research question in itself demands clarifications: why IRAs, why measure the risks of capture and why study Portugal?

There is an extensive research on Independent Regulatory Agencies, which has now been globally diffused (Jordana, Levi-Faur, and Fernández 2011). These bodies, operating at an arm’s-length from its political principals, have raised concerns regarding their democratic legitimacy and accountability (Maggetti 2010; Majone 1999). It has been argued that their expertise, performance, and defense of the public interest is the source of their legitimacy (Majone 1999; Sweet and Thatcher 2002). In other words, IRAs are legitimate in the eyes of citizens because they deliver more efficient markets and protection of the public interest and consumer protection. The problem is that, in the last decades, many crises have emerged (Lodge and Wegrich 2012a) and competition has failed in some markets, thus questioning the performance of regulation (Lodge and Wegrich 2012b). This has been, particularly, the case after the subprime crisis. Regulatory institutions have also been said to be going through a crisis themselves, due to factors, such as the financial crisis and the “post-fact democracy” (Lodge 2016). Twenty years since the peak of the creation of IRAs in Europe and such institutional turbulence, it is

worth reviewing the legal status and the performance of these bodies again. This has been addressed in chapter I.

The choice of studying IRAs through the lenses of the theory of regulatory capture results precisely from the fact that industry capture has been regarded by some as the justification for those crises (as summarized by Braun 2016). Some have cautioned that regulatory capture is hard to prove, that it can simply be a case of bad policy and that, as a theory, it is can be narrow and difficult to measure empirically (Coglianese 2016). While we acknowledge these criticisms, we argued that i) since Stigler's (1971) first approach, the theory has evolved significantly and is now more encompassing and that ii) we do not aim at detecting capture itself, but to identify the risks of capture. We adopted Carpenter and Moss' approach (Carpenter and Moss 2014), according to which regulatory capture is a variable and not a constant. It should not be assumed that all regulation is capture, but rather examine the factors that contribute to more or less capture among sectors and over time. Moreover, we combined the study of the influence of the industry with that of the political principals, in what has been termed by literature as politicization or (absence of) independence. Both perspectives concur to the same objective – to measure the risks of undue influence over bodies that are expected to act and been seen to act as independent. Chapter II further develops the theory and our arguments.

Finally, the choice of Portugal as a case study for the reasons already discussed on Chapter III, is appropriate to our research question and objectives. Among those countries hit by the Eurozone financial crisis, Portugal was probably one of the most affected. It had to request international financial assistance and, almost ten years later, it is still unveiling and investigating banking and supervisory failures. Claims of unsatisfactory performance and absence of independence regarding its regulatory agencies abound (Calvete 2012; Garoupa and Rossi 2005, Ministério das Finanças 2011). Furthermore, while being a case similar to France, with its Napoleonic administrative tradition and its Mixed Market Economy, in what concerns the nature and scope of the Regulatory State, Portugal was a fast privatizer and an early adopter of the IRAs model, in a fashion that seems closer to the British model. The combination of these (almost contradictory) characteristics makes Portugal an interesting case-study.

Thus, to address our main research question we adopted a diachronic and cross-sectorial within-case study and observed the evolution of eleven independent regulatory agencies in Portugal. The timeframe varied, as it depended on the year of establishment of each IRA, but it roughly covers 30 years, from the 1990s until 2019 (chapter IV). The empirical analysis is divided into two steps. First, we measured the formal independence granted to the IRAs, by applying an adapted version of Gilardi's independence index (chapters V and VI). In the second part, we examined the de facto independence vis-à-vis both the regulatees and the political principals, by measuring the intensity of the revolving doors, trends on early departures and the financial management of the agencies (chapters VII, VIII and IX).

Main Findings

The creation and evolution of Portuguese IRAs: a bumpy road

Sectorial administrative bodies existed in Portugal since the 19th century, some of them shaping current ones, namely those of the financial sector, civil aviation or, already in the 1980s, telecommunications. Yet, it was in the 1990s, under the influence of the new public management and liberal economic theories promoted by international organizations, that the diffusion of autonomous administrative bodies kicked off. The first Portuguese IRAs – the securities and the electricity agencies – were set up in a kind of legal void and were immediately questioned in its democratic legitimacy and constitutionality.

The 1997 constitutional amendment tried to solve the problem, but in fact it just opened the door to the diffusion of quasi-independent bodies across the Portuguese public administration. In the months that followed the adoption of the new constitutional amendment, the number of “public institutes” grew exponentially, including among them agencies with regulatory powers. It was in 1997/8 that the civil aviation and the insurance agencies gained autonomy status, the electricity IRA was finally operational, the central bank began exercising its supervisory powers over banks, the media and water/sewage agencies were set up. The second wave of agencification took place between 2003 and 2005 when the competition authority was created, a fully independent telecommunication and postal regulator emerged, and a new media agency replaced the unsuccessful one.

The third wave of reform came about with the financial bailout and the demands of the assistance program. In 2013, the approval of the Framework Law of the Independent Regulatory Agencies led to the homogenization and clarification of the legal status of nine regulators.

De jure independence: the tension between technocracy and party politics

The institutional design of agencies is the first step in the creation (or not) of a protection against the capture or political interference. On chapter VI, we addressed the questions “to what extent are IRAs legally independent?”, “how have legal provisions evolved and which factors have influenced diachronic and cross-sectorial variation?”. To answer these questions, we tested hypotheses built on regulation studies that had been applied to the outset of the agencies, but also hypothesis originating from party politics scholarship. The main objective was to assess how IRAs were formally protected from undue influences from companies or incumbent parties.

Our analysis showed that the first IRAs were created with relatively low levels of formal independence and increased it over time, in some cases in an exponential manner. The existence of many reforms (sometimes three per regulator) suggests that each amendment in the degree of formal independence was never definite. There was always room left for future improvements. The results lead us to two main findings. The first is that external inputs are the drives of change over time and not only at the outset of agencies. Empirically, Europeanization and the need to project credible commitments over policies had already been identified as being at the core of the establishment of IRAs, through sectoral directives and the need to attract investors at times of privatizations and market liberalizations. What our research found was that external factors were also behind the successive reforms of the statutes of IRAs. In the specific case of Portugal, besides the EU, the troika was an additional source of pressure that came into play at a later stage. Thus, the coercive isomorphism hypothesis is confirmed to be a key factor throughout time. Additionally, the need to project credibility towards potential investors has also to be periodically renewed. This may be due to two reasons. One is the fact that market liberalization and privatizations were not a one-time event but were phased out over time. At each new phase, governments needed to commit themselves again to these policies. And this suggests the second reason: if governments need to renew their credibility

towards investors, it might mean that over time that credibility had been lost, for some reason, most possibly because the outcomes of the independent regulation did not fulfill the expectations, as it is possible to conclude, for instance, from the analysis of the Troika before the 2011 Financial Assistance (European Commission 2011).

The second finding related to the diachronic evolution of the formal independence of IRAs is that politicians try to retain as much power as they can while balancing it with the need to project credibility and respond to the legal demands of the coercive isomorphism. This explains the fact that, even after several reforms, lawmakers still have room for deepening independence. Moreover, when in office, parties are more reluctant to grant formal independence to IRAs than when they are in the opposition. This conclusion contradicts some hypotheses advanced by literature, which posited that, when in power, parties tended to grant more independence to IRAs to tie the hands of future governments. Our research found that regardless of their ideology, parties in the opposition tend to be more reformist in their proposals, which they will tend to waive once in office. Also, despite imposing restrictions on the interference from the industry, politicians are not willing to do the same for themselves, as they maintain some control mechanisms, such as the choice of board members. By retaining appointment prerogatives, they can appoint party loyalists.

De facto independence: Sector and Age are key

In chapters VII and VIII, we analyzed the de facto independence of regulators from both politicians and the industry, by looking at three phases of the activities of IRAs. The professional and political careers of board members were investigated, to measure their ex-ante and ex-post links to political parties and the regulated industry. At the throughput level, we looked, in an exploratory manner, to the number of early departures, the spending freezes imposed by the government on agencies and the instances of regulatory litigation (here the risk is absence of litigation deriving from friendlier regulation).

On what concerns the ideology of the appointing government, it was concluded that, although left-wing executives have chosen more politically experienced individuals, the multivariate analysis has not shown any particular effect. Ideology does matter when it comes to early departures. Under left-wing governments, there are 4 times more board

members leaving office before the end of their term, than under right-wing ones. Formal independence also does not seem to play a significant role in determining the profile of board members, which confirms Maggetti's conclusions in previous studies (Maggetti 2007).

The most important effects seemed to be the old age of agencies and the sector. The financial sector is the one in which there is a greater propensity to appoint people coming from the regulated industry, corresponding to more the 50% of appointments in the sector. Governments tend to appoint party loyalists mostly to utilities, as 46% of all board members in these IRAs had prior political experiences. However, the financial sector is very close to the utilities sector in terms of the share of former politicians in the agency's social composition (42%). Over time, governments are less likely to appoint their loyalists to IRAs. There were more party loyalists appointed back in the 1990s than there are today. However, there are no significant effects of age of agencies in the appointment of people coming from the industry or senior officers in the public administration. In terms of politicization of the agencies' activities, age seems to matter for another indicator – spending freezes. Older agencies have undergone less budget spending freezes and have overturned the freezing orders of the government, claiming their financial independence.

Party politics is alive and well

Despite the theoretical arguments explaining the motivation of governments to establish IRAs (such as blame-shifting, technical expertise, etc.), politicians only seem to do so when they are forced by the circumstances, such as the adoption of EU legislation, a bailout or the need to attract foreign investment. When faced with such external pressures, governments concede but only to a certain extent, as they retain the most important powers over agencies – appointment of board members and budgetary control. IRAs are still treated as an extension of the public administration under government control. In fact, the proliferation of independent bodies might even mean more perks to be distributed among party loyalists, through more senior positions available and with higher salaries than the regular public administration. Such finding is reinforced by the fact that political parties show different views on delegation, whether they are in government or in the opposition, being more favorable to political control as incumbents. For instance, parties refuse to approve competitive open calls for the boards or introduce/review cooling-off

periods between political and regulatory offices once in power. The absence of such provisions ensures that governments can choose who they want for the boards and reward party loyalists.

If this reluctance in limiting their own control was identified in all statutes and amendments, it is even more visible in the agencies' daily functioning. Governments do make use of their right to appoint individuals with a political past, as more than one-third of board members have political experience (in one agency, this percentage almost reached 100 and in others exceeds 50). Additionally, despite the ban on dismissals, the first months of new political cycles witness a rise in early departures, most of them of board members with links to the industry or no particular affiliation.

The old age of agencies seems to matter for the reduction of the number of politically experienced board members. However, this does not necessarily mean less politicization of agencies. The same effect is not observable in the nomination of individuals that were previously in politically appointed jobs in the public administration, which might suggest that governments are not going for the obvious political loyalists but prefer a more discreet reserve of individuals that still depend on them to get senior public positions. The introduction of a more active role of parliament in the appointment process, even if not legally binding, might have had some influence. However, since the introduction of such provisions was contemporary to a cabinet that strongly relied on parliament, the Costa executive (2015-2019), it is too early to clarify the explanatory factors. Besides, the data on spending freezes also suggests that governments might be making use of alternative control instruments.

The “state-owned” mentality persists

Politicians still consider certain sectors as being part of the public administration under their control. This is particularly true for former or current monopolies. Even if some utility agencies are formally the most independent ones, the reason lies in the fact that they are more exposed to EU regulation and operate in sectors that have been fully privatized (i.e., electricity and telecommunications regulators). In other sectors, such as water and railways, the increased formal independence came with the expectation of privatization or liberalization. In practice, utilities agencies have been maintained under

the control of governments, with an average share of politically experienced board members of around 50%, almost reaching 100% in the case of the land and maritime regulator. Thus, it seems that, when governments can no longer (or perceive that they will no longer) control key markets through state monopolies, they try to do so by controlling the respective regulator, in a clear case of patronage of control.

Another sign that parties continue to regard IRAs as yet another branch of the public administration under their control is the nature of patronage in appointments. Half of the political appointees take up the regulatory job right after leaving political office and the majority occupied junior positions in cabinet, such as advisors. Being appointed to the board of IRAs functions as a reward, a promotion in terms of career, status, and salary. Moreover, a regulatory office also works as a trampoline for other careers. While we were expecting that politically linked board members would go back to their previous careers (closing the revolving door, as it happens in all other categories), the data shows that they are the only appointees who spread towards other careers paths, including in the regulated industry.

The not so evident capture by the industry

The potential influence of the industry in the Portuguese regulatory agencies is less visible than the political one. In most IRAs, neither there is a strong tendency to appoint industry-related individuals, nor former regulators tend to join the regulatees after leaving office. This does not mean that influence cannot occur, but only that, if it does, it is not so direct. In other words, the regulators are not a preferred target of influence by business interests. This may be due to the fact that legal barriers were introduced in the statutes, right from their foundation, to limit the influence of the industry (namely cooling-off periods or bans on financial interests in the regulated firm). However, as other studies on the Portuguese case have found (Costa et al. 2010; Louçã et al. 2014), strong links remain between former state monopolies and political parties, namely through intense revolving doors. Hence, influence may be exercised indirectly, i.e., the industry may reach the regulatory outcomes it aims by controlling the government, which in turn may politicize the agencies.

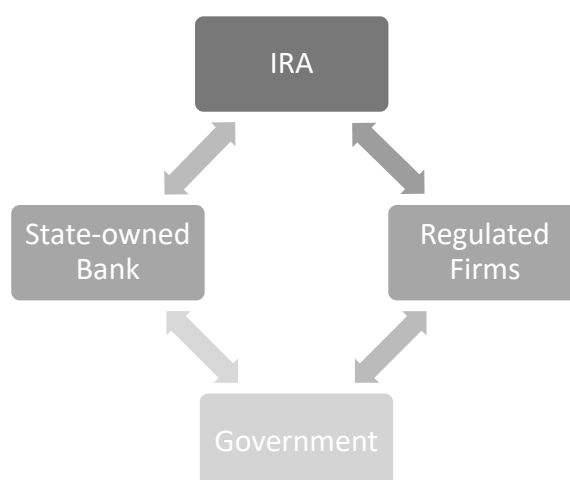
The Financial Sector stands out

The financial sector emerges as the exception to this weak influence of the industry. In both de jure and de facto analysis, the influence of the regulatees in this sector is fairly visible. The three financial regulators displayed, in the early days of their establishment, comparatively high degrees of formal independence. More than any other agencies, they were financially and organically more independent. Over time and with the increase of de jure independence of other agencies, financial regulators were left behind in the ranking. The explanation rests in the provisions aimed at controlling the influence of the regulatees. Cooling off periods related to the industry were introduced in the utilities and health agencies, for instance, but not in the financial ones. Even after the financial bailout and the subsequent legal reforms of the IRAs, the financial agencies showed themselves against the adoption of cooling-off periods and the banking regulator has been able to escape all barriers to the revolving door phenomenon.

In practice, the relationship between these regulators and their regulatees is particularly close in the financial sector. More than half of board members come from the industry and an even bigger share moves to regulated firms once their regulatory mandate is over. It is not difficult to understand why IRAs lobbied for less legal restrictions during the debate over the bill that led to FLIRA. Maintaining the existing state of affairs – an intense revolving door – was more important than shielding the regulators against capture.

Nevertheless, it is not only with the regulatees that financial regulators maintain close ties. It is also with their political principals, in a way that is very similar to the control mechanisms governments have used over the utilities' agencies. The share of politically experienced board members in financial IRAs is not much smaller than the ones displayed by the utilities' regulators. Instead of a revolving door, it seems that there is a revolving platform in place, on top of which individuals jump from political jobs to regulators to large financial groups, in a never-ending dance. If we add the state-owned bank (*Caixa Geral de Depósitos* - CGD) to the equation, then the revolving platform becomes even more intricate.

Figure X.1. The Revolving Door of Individuals in the Financial Sector



Besides the potential cognitive capture and the traditional capture that promotes favoritism in the decisions of the regulator, intense revolving doors have two other negative consequences that were materialized in the Portuguese financial crisis and outlined in parliamentary inquiry reports. Frequent social interactions and proximity between individuals who sometimes are colleagues and other times are in regulator/regulatee positions, may undermine authority of the IRAs. As regulators, it may be difficult to enforce strict oversight and impose heavy sanctions on former colleagues. Plus, it is easier to blindly trust people you know and lessen the skeptical posture supervision should have. The final report of the parliamentary inquiry commission on the capital injection and management of CGD concludes that the banking regulator “downplayed the behavior of managers and power segregation”, and “had an extreme trust in the internal lines of defense of institutions [...] that it did not act in the face of public remarks, attention calls and (Almeida 2019: 181).

Another negative consequence is the possibility of those who are in the regulatory office may have to judge their own management decisions at the time when they were in regulated firms. The cycle of supervision, enforcement and sanctioning is necessarily long and may last beyond one board term. Once again, the parliamentary inquiry committee on the CGD illustrates this: the head of the banking regulator was a manager of the state-owned bank during the period that was being investigated by parliament (Almeida 2019: 122). When in place and with the adequate length, ex-ante cooling-off periods and internal management of conflicts of interest mitigate this risk. We have

noticed, however, that such the quarantine mechanism is in place in the utilities regulators but was refused by financial ones and removed from the health agency.

Most studies argue that the cozy relationship between the financial industry and public and political institutions amount to regulatory capture (Che 1995; Katic 2015; Tabakovic and Wollmann 2018; Transparency International 2011). Yet, others have claimed that capture is a concept that is too narrow to define “the complex relationship between financial stakeholders and their national governments, [...which] have historically been part of deeply interconnected European financial ecosystems bound both by political and financial relations. Patterns of pressures and influence within these financial ecosystems have always run in both directions and have been mutually reinforcing” (Monnet et al. 2014) The intensity of the revolving door in our case study and the consequences it has, for instance, in the regulation of the financial IRAs themselves (formal independence from the government but little barriers to the influence of the industry) suggests that Monnet and associates’ views are confirmed in the case of Portugal.

Implications and contributions

The formal independence of IRAs had been extensively studied during the emergence of these agencies (Gilardi 2002, 2005a, 2008; Hanretty and Koop 2012), but studies were limited to the first legal acts. From then on, research focused on de facto independence. Over a decade after the first data collection, we revisited the de jure aspects of IRAs, concluding that the story of the design of agencies is not concluded once they are set up. Using a diachronic with-in case study, we showed that de jure independence plays a role throughout the lives of agencies. It remains an instrument of influence at the disposal of principals, but also subject to continuous pressure from external inputs, such as European law and investors. A more encompassing and comparative study on the evolution of de jure independence across countries and over time is needed. Besides adding to the existing literature on regulation, such research would contribute to a better understanding of the impact of Europeanization over time, but also its dynamics with national-level party politics.

In what concerns de facto independence, this dissertation introduced a new perspective to the analytical framework. So far, most studies focused on appointments and early

departures and how these were used for political patronage purposes, not paying enough attention to the links board members had with the regulated sector. Other studies, particularly in the United States and mostly in the financial sector, concentrated on the revolving door between the agency and the industry,

Our research makes an original contribution to the study and understanding of capture as a phenomenon. We argue that, contrary to what Stigler posited in the 1970s, but in line with the most recent literature, “regulatory capture is not an all-or-nothing affair” (Carpenter and Moss, 2014: 452), it is a continuum (Rex, 2018: 3) and, despite existing, its occurrence is not systematic (Carpenter 2013). It depends mainly on sectors, age, cabinet composition, but also on external drivers that motivate, but mostly coerce governments.

A final contribution relates to the way the theory of regulatory capture is regarded in Europe. During the financial crisis, North-American literature was quick to retrieve the theory and applying it to their context, partly because there is more data available on influence (political donations and lobbying) than in Europe, where, some have claimed “bureaucrats in financial regulatory agencies and central banks are more likely to spend most of their career in the public sector” (Monnet, Pagliari, and Vallée 2014: 5). We have shown that this perception does not fully resonate with empirical evidence, in the financial but also in other regulated sectors. Thus, European institutions, and academia, should take a closer look at regulatory capture risks.

APPENDIX A - INTERVIEWS

A1 – Interview Guide

1. Can you explain the key features of the regulated market (many players, public, private, PPPs or competitive?)
2. In what context was the agency created? (EU law, privatization/market liberalization, etc.)
3. Who were the political agents and interest groups that contributed to the design of the agency?
4. This IRA's statute have already been amended X times. What is the reason/motivation for these amendments? (new EU directives, changes to the Public Administration Act - PRACE, public manager status - pressure from the regulated)
5. In statutory terms, is there a need to strengthen the IRA's independence?
6. In practice, is the IRA independent?
7. What is the background of most members of the Board of Directors? What about the directors?
8. (EXTRA: How was your departure? Resignation? Not renewal?)
9. Who named you / how did your name come about? Suggestion from the political party, personal contact with minister concerned, suggestion from IRA itself?
10. And your colleagues, how were they named?
11. What is your perception about the revolving doors phenomenon in the IRA?
12. Has there been or is there political influence on IRA's activities/decisions?
13. Were there or are there pressures from the regulated in the activities/decisions of the IRA?
15. In practice, does the IRA report to the Parliament, the Government, the courts?

A.2 - List of Interviews

NAME	POSITION
Jorge Vasconcelos	Former Head of ERSE
Pedro Pita Barros	Former Board Member of ERSE Specialist in the Health Sector
João Confraria	Former Board Member of ANACOM and ANAC Specialist in Regulation
Rui Nunes	Former Head of ERS Specialist in the Health Sector
Rui Cunha Marques	Specialist in Water Infrastructures
Álvaro Santos Pereira	Former Economy Minister
Vítor Santos	Head of ERSE (at the time of interview)
Álvaro Simões	Former Head of ERS
Hélder Rosalino	Former Secretary of State for the Public Administration

APPENDIX B – PARLIAMENTARY BILLS

Political Party	PSD-CDS Government 2002-2005	Socialist Government 2005-2009	Socialist Government 2009-2011	PSD-CDS Government 2011-2015	Socialist Government 2015-2019
PS	<p>Bill no 346/IX Bill no 178/IX Appointment: IRA board members are appointed by the council of ministers after presentation of the appointed to parliament Incompatibilities: Individuals cannot be appointed to the board if in the two previous years, they have taken executive position in regulated companies. Board members cannot hold other private or public positions, except teaching, not maintain any link to regulated companies or hold any interests. After the end of the mandate, board members are subject to a 2-year cooling off period, during which they will be paid 2/3 of the salary. Mandate duration: Non-renewable 5-year mandate</p>			<p>Proposal for changes in FLIRA Appointment: Board members are appointed by the Council of Ministers, after a hearing and a favourable opinion by the competent parliamentary committee of the Assembly of the Republic.</p>	
PSD		<p>Bill no 344/X (2007) Appointment: IRA board members are appointed by the President of the Republic, on the proposal of the Government and after the respective public hearing in the Assembly of the Republic. Demission: Board members can be dismissed if they fail to comply with the activity</p>	<p>Bill no 49/XI (2009) Appointment: IRA board members are appointed by the President of the Republic, on the proposal of the Government and after the respective public hearing in the Assembly of the Republic.</p>		<p>Bill no 595/XIII/2^a Incompatibilities of the Bank of Portugal: BdP's bodies may not, after termination of their mandate and for a period of two years, establish any relationship or contractual relationship with the companies, groups of companies or other entities, which are the</p>

		plan in a substantial and unjustified manner			beneficiaries of the bank's regulatory and supervisory activity, having the right to Referred to a period equivalent to ½ of the monthly salary. The cooling off period is reduced to 6 months to the holders of the BdP's organs and to other management positions with supervision responsibility of the BdP that return to their place of origin outside the BdP.
					Bill No 839/XIII/3.a Ban on spending freezes imposed by the government on IRAs
PEV					Bill no 279/XIII/1 ^a (2016) Appointment: IRA board members are appointed, after a mandatory and binding opinion of the Assembly of the Republic, by Resolution of the Council of Ministers.
CDS			Bill no 55/XI/1. ^a (2009) Bill no 382/XI/1. ^a (2010) Appointment: IRA board members are appointed by the President of the Republic, on a proposal from the Government and after a public hearing at the Assembly of the Republic, whose opinion is not binding. Incompatibilities: Individuals cannot be appointed to the board if in the two previous years, they have been i) a member of executive boards of companies, trade unions, confederations or business associations of the sector regulated by the independent administrative entity; ii) a		Bill no 299/XIII/2. ^a (2016) Salaries: In the two years after leaving office, board members cannot take positions in regulated companies and will receive a financial compensation of ¼ of their salary.

			<p>member of the Government, the executive bodies of the Autonomous Regions or local authorities.</p> <p>Demission: Board members can be dismissed if they fail to comply with the activity plan</p>		
BE					<p>Bill no 179/XIII/1.^a (2016)</p> <p>Incompatibilities: After the termination of their mandate and for a period of six years, board members may not establish any contractual relationship or relationship with the companies, groups of companies or other entities that are the beneficiaries of the activity of their respective regulator.</p> <p>Mandate duration: Board members have a non-renewable 6 year mandate and cannot be hired for another position in the IRA</p>

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